

**ACCESS TO WORK FOR DISABLED PERSONS IN SOUTH AFRICA:
THE INTERSECTIONS OF SOCIAL UNDERSTANDINGS OF DISABILITY,
SUBSTANTIVE EQUALITY AND ACCESS TO SOCIAL SECURITY**

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Declaration

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Abstract

Access to work for disabled persons in South Africa: The intersections of social understandings of disability, substantive equality and access to social security

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This thesis examines possible synergies and points of friction between understandings of disability that emphasise its social contingency and jurisprudential debates on substantive equality and access to social security in the context of the promotion of access to work for disabled persons in South Africa. In consequence of an analysis of theoretical debates in the field of disability studies and how these find application in the sphere of employment equity law, it is concluded that, while social understandings of disability mostly focus on structural changes that would see people with disabilities who can and want to work gain access to such work, the positive obligations imposed on employers and the state in terms of equality rights and employment equity legislation are of limited depth and breadth. It is proposed that one potential course of action to address the limited scope of equality law would be to emphasise the state's obligations in terms of socio-economic rights where these rights are relevant to work inequality. Particular emphasis is placed on how the interpretation and application of the right to access to social security could be used to activate government's duties in respect of unemployment protection and work creation. The conclusion reached is that while this strategy poses risks and has its limitations, it can be used to improve information gathering in respect of disabled work seekers that will aid planning and enforcement; to facilitate support for disabled work seekers who experience discrimination; to compel government to improve the implementation and enforcement of employment equity laws in respect of disabled work applicants; to catalyse a holistic approach to social security that considers the interrelationship between social assistance and promoting unemployment protection for disabled persons who are willing and able to work; and to provide different forms of support to disabled people who do not operate in the formal labour market, but who can and do perform work that falls outside the scope of traditional labour market regulation.

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Abbreviations Used in and Related to Case Citations

(A)	Appellate Division, now the Supreme Court of Appeal
A	Arbitrator
AJ	Acting Judge
AJP	Acting Judge President
BALR	Butterworths Arbitration Law Reports
BCA	Bargaining Council Arbitration
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
(C)	Cape Provincial Division, now the Western Cape Division of the High Court
(CC)	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CJ	Chief Justice
DLR	Dominion Law Reports
DP	Deputy President of the Constitutional Court
(EqC)	Equality Court
EWCA Civ	England and Wales Court of Appeal (Civil Division)
ILJ	Industrial Law Journal
(IMSSA)	Independent Mediation Services of South Africa
J	Judge
JA	Judge of Appeal
(LAC)	Labour Appeal Court
(LC)	Labour Court
(NmS)	Namibian Supreme Court
obo	on behalf of
P	President of the Constitutional Court

plc	public limited company
SA	Juta's South African Law Reports
SCA	Supreme Court of Appeal
(T)	Transvaal Provincial Division of the High Court
(W)	Witwatersrand Local Division, now the South Gauteng High Court

Other Abbreviations Used

ADA	Americans with Disabilities Act
AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
AZAPO	Azanian People's Organization
BBBEE	Broad-Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act
BPS	Biopsychosocial
CBA	Cost-benefit analysis
CEE	Commission for Employment Equity
CESCR	Committee on Economic, Social and Cultural Rights
CLoSA	Constitutional Law of South Africa
COIDA	Compensation for Occupational Injuries and Diseases Act
CRPD	Convention on the Rights of Persons with Disabilities
DPOs	Disabled People's Organisations
DPSA	Disabled People South Africa
ed(s)	editor(s)
EC	European Council
EE	Employment Equity
EEA	Employment Equity Act
EEOC	Equal Employment Opportunities Commission (USA)
ESA	Employment Services Act
fn	footnote
GG	Government Gazette
GN	Government Notice
HIV	Human Immunodeficiency Virus

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICIDH	International Classification of Impairments, Disabilities and Handicaps
ILO	International Labour Organization
IMATU	Independent Municipal and Allied Trade Union
INDS	Integrated National Disability Strategy
LLD	Legum Doctor (Doctor of Laws)
LRA	Labour Relations Act
MEC	Member of the Executive Council
MHCA	Mental Health Care Act
NAPTOSA	National Professional Teachers' Organisation of South Africa
NEHAWU	National Education Health and Allied Workers' Union
NEDLAC	National Economic Development and Labour Council
ODMWA	Occupational Diseases in Mines and Works Act
para(s)	paragraph(s)
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PFA	Pension Funds Act
POPCRU	Police and Prisons Civil Rights Union
PWDs	Persons with Disabilities
RAF	Road Accident Fund
RTW	Return-To-Work
s	Section
SAA	Social Assistance Act
SADC	Southern African Development Community
SADTU	South African Democratic Teachers Union
SEE	Supported Employment Enterprises
Ss	Subsection
StatsSA	Statistics South Africa
TAC	Treatment Action Campaign
TAG	Technical Assistance Guidelines on the Employment of People with Disabilities
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UK	United Kingdom

UN	United Nations
US(A)	United States (of America)
WG	Washington Group
WHO	World Health Organization

CHAPTER 1: INTRODUCTION

1.1 Background to the research question

Persons with disabilities are struggling to find and retain employment in South Africa. The Integrated National Disability Strategy White Paper of 1997 (INDS), in its situational analysis, estimated that 99% of disabled people are excluded from the open labour market in South Africa.¹ That picture does not seem to have become any brighter over time. The latest report of the Commission for Employment Equity (CEE) reveals that only 0.9% of the workforce of big employers in the formal labour market are persons with disabilities.² The corresponding figure in 2003 was 1.3%,³ so in percentage terms there has been a regression in disability representation.

The poor representation in formal employment must be viewed in the context of the latest census's estimation of a national disability prevalence rate of 7.5%.⁴ Furthermore, Statistics South Africa (StatsSA) cautions that this figure "should not be used for purposes of describing the overall prevalence or profile of persons with disabilities in South Africa."⁵ This is because the statistics exclude children under the age of five and "persons with psychosocial and certain neurological disabilities."⁶ People with disabilities in institutions such as boarding schools, residential care facilities and children's homes were also excluded, as the surveys were only

¹ South Africa. Office of the Deputy President. *Integrated National Disability White Paper*. (1997) <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1144&context=gladnetcollect> (Accessed: 6 February 2015) (hereinafter referred to as "The INDS") Chapter 1.

² CEE. 14th *Commission for Employment Equity Annual Report 2011-2012*. (2014) <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2013-2014/14ceeannualreport.pdf> (Accessed: 6 February 2015) 19.

³ Ibid.

⁴ StatsSA. *Census 2011: Profile of Persons with Disabilities in South Africa, Report No. 03-01-59*. (2014) <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf> (2014) (Accessed: 6 February 2015) (hereinafter referred to as "StatsSA 'Disability Profile'") v.

⁵ Ibid. Some commentators have argued that disability prevalence is higher than official figures suggest and that it is rising (see H Kathard. Parliamentary Input to Public Hearings on Disability. *Rehabilitation as a Human Right for Persons with Disabilities*. (2012) 3).

⁶ StatsSA 'Disability Profile' 2.

conducted in households.⁷ The relevance, use and limitations of survey data on disability is discussed in Chapter 6.⁸

The under-representation of disabled persons in the labour market is consistent with a worldwide trend and is a cause and effect of their social exclusion, or inclusion on unfair terms.⁹ Throughout history, societies' responses to what is regarded as atypical behaviour, experience and appearance range from charity to judgement, as well as the removal of people with atypical bodies from society.¹⁰ Organised disability movements throughout the world have fought this social oppression at international and local levels.

In South Africa, oppression is more closely connected with race and, to a lesser extent, gender.¹¹ The common sense definition of disability most people are likely to give is that someone is disabled "when their body or mind doesn't work properly."¹² This way of thinking characterises disability as a problematic individual status, the solutions to which are to 'fix' the disabled person or to have others take care of the disabled person.¹³ This "personal tragedy theory of disability"¹⁴ has been challenged

⁷ Ibid.

⁸ See 6.3.1.

⁹ See, for example, World Health Organization (WHO). *World Disability Report*. (2011) (hereinafter referred to as "WHO 'Disability Report'") 39, in which it is noted that descriptive data seems to indicate that disabled persons are at a disadvantage in respect of "educational attainment and labour market outcomes" in both developed and developing countries.

¹⁰ E DePoy and SF Gilson. *Studying Disability: Multiple Theories and Responses*. (2011) 9-10 explain that historical analyses of disability reveal that:

1. What is atypical differs according to context.
2. In each era there have been several potential, assumed and accepted explanations for a single atypical human characteristic.
3. These explanations form the basis for legitimate characterization and subsequent response to category members.
4. The responses proffered provide an analytic window on the beliefs, values, politics, economics, intellectual trends, and level of technological development of the times, as well as a reflective platform on how current definitions of disability influence how we interpret history." [footnotes omitted]

¹¹ L Swartz and B Watermeyer. Introduction and Overview. In: B Watermeyer, L Swartz, T Lorenzo, M Schneider and M Priestley (eds). *Disability and Social Change: A South African Agenda*. (2006) 1.

¹² D Marks. *Disability: Controversial Debates and Psychosocial Perspectives*. (1999) ix; Swartz and Watermeyer 1.

¹³ A Lawson. *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*. (2008) 18. M Priestley. Developing Disability Studies Programmes: The International Context. In: B Watermeyer, L Swartz, T Lorenzo, M Schneider and M Priestley (eds). *Disability and Social Change: A South African Agenda*. (2006) 19 (hereinafter referred to as "Priestley 'Disability Studies Programmes'") at 25 writes: "[T]here is a strong tradition in medicine and therapy concerned with measuring and investigating the limitations of the body. Similarly, there is a strong tradition in psychology and

for the last four decades by disability movements in various parts of the world,¹⁵ who have argued that it has relegated disabled people to the margins of society, dependent on others and severely stigmatised. Instead of focusing on what is wrong with the individual, the focus should be on the ways in which environmental, social and cultural barriers disable people.

This shift from individual models of disability to what has broadly been termed the social model of disability has been credited with the development of disability as a human rights issue, instead of just a medical or welfare issue.¹⁶ In this work, I will use the phrase “social understandings of disability” to refer to both the social model of disability as developed in Britain, as well as other explanations that are not necessarily consistent with this model, but that nevertheless emphasise environmental, social and cultural factors to varying degrees. Within this rubric I also include so-called interactionist approaches, which view disability as the interaction between individual characteristics and the physical and social environment.

I will argue that while social understandings of disability have no doubt made and still make enormous contributions in shifting the terms of discussions on disability, some of the debates within disability studies reveal disagreements and grey areas that are often mirrored in conceptions of disability in legislation, policy documents and case law. These uncertainties and inconsistencies are visible in who qualifies as disabled for protection from discrimination; the ways in which courts, tribunals and other relevant decision makers interpret and apply equality laws; and the underlying principles that shape the conception and implementation of social security laws and policies.

counseling that also locates disability as a property of the individual, with an emphasis on how disabled people cope with their ‘limitations’ and how they negotiate social roles.”

¹⁴ M Oliver. *The Politics of Disablement*. (1990) (hereinafter referred to as “Oliver ‘Disablement’”) 1.

¹⁵ AS Kanter. “The Law: What’s Disability Studies Got to Do with It or an Introduction to Disability Legal Studies.” (2010-2011) 42 *Columbia Human Rights Law Review* 403

¹⁶ G Quinn, T Degener, A Bruce, C Burke, J Castellino, P Kenna, U Kilkelly and S Quinlivan. “Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability.” (2002)

<http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (Accessed: 6 February 2015) (hereinafter referred to as “Quinn et al ‘UN Human Rights Instruments’”) 14.

Various South African policy documents recognise the social causes of disability and that a rights-centred approach to disability is required.¹⁷ According to the INDS, the reasons for the low employment rate of disabled people include low skills levels due to inadequate education, discriminatory practices by employers, past discriminatory and ineffective labour legislation, inaccessible and unsupportive work environments, inadequate and inaccessible provision for vocational rehabilitation and training, inadequate access to information and ignorance in society at large.¹⁸

Yet, for all the rhetorical prominence of the social dimensions of disability and the express articulation of rights that can be claimed by persons with disabilities, it is clear that the inclusion of disabled people into formal labour structures is not progressing at a satisfactory rate. The reasons for this slow progress are complex and multiple, integrated responses are necessary. However, the parameters of this work have to be narrowed for practical reasons. I will therefore limit myself to a consideration of the extent to which social understandings of disability have been integrated into selected South African laws that affect access to work for disabled persons. I will also explore the possibilities and limitations of such integration.

In most South African legal texts on employment equity, the social nature of disability is recognised and then followed by an exposition of how equality provisions in the

¹⁷ The INDS, in its Executive Summary, states:

“Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. Because the emphasis is on the medical needs of people with disabilities, there is a corresponding neglect of their wider social needs. This has resulted in severe isolation for people with disabilities and their families.

Over the past decade, disabled people's organisations all over the world have worked to reposition disability as a human rights issue. The result is a social model for disability based on the premise that if society cannot cater for people with disabilities, it is society that must change. This model requires substantial changes to the physical environment. The goal must be the right of people with disabilities to play a full, participatory role in society.”

See, also, South Africa. Department of Public Works. *Disability Policy Guidelines*. (2010) www.publicworks.gov.za/PDFs/documents/WhitePapers/Disability_Policy_Guideline.pdf (Accessed: 6 February 2015) 8; and South Africa. Department of Social Development. *Policy on Disability*. (2009) 10-11.

¹⁸ Chapter 1. This pervasive and varied nature of these challenges is also recognised in the WHO ‘Disability Report’ (at 10) when it notes that disabled persons are less likely to attend school; more likely to be unemployed and to earn less than people without disabilities when employed; incur extra additional costs due to their disability, which means that they require more resources to achieve similar outcomes to people without disabilities; and households with disabled members are more likely to experience material hardship.

Constitution and legislation protect disabled persons. In my view, further analysis is required of the extent to which the substantive legislative provisions and procedural mechanisms recognise or incorporate social understandings of disability, both at a micro and macro level.

Charles Ngwena, in his LLD thesis,¹⁹ emphasises the difference between formal and substantive conceptions of equality and cogently argues that substantive equality has to be the bedrock of disability equality. He then explains why, in his view, “social model” understandings of disability have to be integral to notions of substantive equality. This study seeks to engage with and build on Ngwena’s elucidation of substantive equality and its relationship to what Ngwena terms the social model of disability.

Our approaches differ in various respects. Ngwena’s study is comparative in nature, while my focus is on South African laws and their implementation. Secondly, his primary objective was the development of the “disability method” as an interpretive approach to equality. While I do address issues of substantive equality, my primary emphasis is not on jurisprudential notions of equality. Instead, most of the work is devoted to the nature of the positive obligations imposed on employers and government in respect of access to work, as well as the possibilities and limitations these hold in achieving the social goals that flow from social understandings of disability.

I will argue that, in light of critiques of the social model of disability within disability studies, lawyers and policymakers have to develop a richer understanding of social explanations of disability that go beyond the traditional social model of disability. This is necessary because these critiques mirror many of the questions raised by scholars who explore different formulations of substantive equality. Ngwena, in his study, indicated that he would not consider different formulations as it was not his

¹⁹ CG Ngwena. *Disabled People and the Search for Equality in the Workplace: An Appraisal of Equality Models from a Comparative Perspective*. (2010) (hereinafter referred to as “Ngwena ‘Search for Equality’”) 2.

intention to come up with an equality blueprint.²⁰ It is also not my intention to suggest a blueprint here, but I am of the view that exploring different formulations of substantive equality offers valuable engagement with what potential aims of the right to equality could be, not in a prescriptive way, but in the spirit of a dialogical consideration of potential options.

The engagement with substantive equality in the context of access to work is also predicated upon my view that disability is similar to,²¹ but also different from, other identity markers such as race, gender and sexual orientation. While it is useful to consider and learn from the parallels between disability and other markers of disadvantage, this work also reflects on differences between disability and these other markers.²² In particular, the centrality of impairment will be highlighted.

“Dialogue within a heterogeneous public sphere in which historically disadvantaged groups are entitled as of right to ‘open access, participatory parity and socio-economic equality’” is at the heart of Ngwena’s disability method, which he characterises as “a transformative interpretive methodology for establishing an inclusive universe of equality, that is, a universe that accommodates enabled people and disabled people in equal measure”.²³ This study proceeds from the starting point that Ngwena’s adoption of Iris Young’s “heterogeneous public sphere”²⁴ is a useful way of assessing process equity and that this approach has to animate both the conception of laws and their implementation.

²⁰ Ngwena ‘Search for Equality’ 339. He writes:

“I do not proceed, as other commentators have done, on the analytical footing that the search for a more substantive type of equality depends, inter alia, on exploring, comparing and contrasting the reaches of the equality of opportunities approach and the achievement of equal outcomes or results as the alternatives to the formal equality approach and ultimately settling on a particular type so that it becomes a blueprint.”

²¹ See Ngwena ‘Search for Equality’ 105, who reasons as follows:

“As a site for the social construction of race, especially, apartheid offers a rich entry point for comprehending the epistemology of disability, the phenomena of oppression and structural inequality that are organised around the hegemony of a socially constructed bodily norm. Though apartheid and disablism do not share the same aetiology and ‘physical’ particularities, nonetheless, they share common mechanisms and effects in terms of the creation of subordinated difference and exclusionary citizenship.”

²² See 4.4.4.2.

²³ Ngwena ‘Search for Equality’ 338.

²⁴ Ngwena ‘Search for Equality’ 65 fn 249.

Another gap in the existing literature is that disability is often discussed quite disparately in labour law and social security law. Commentators recognise that disability definitions for anti-discrimination and social assistance eligibility, respectively, should not necessarily be the same. My approach aims to integrate non-discrimination provisions into a larger conceptual framework that explores the intersections of substantive equality and access to social security or social protection.

Similarly, when rights frameworks are set out in the literature, the principle paradigm has been one focused on equality, and non-discrimination in particular. Along with the focus on equality, most of the discussions in the literature have articulated the protection of individual disabled persons' rights when their employers have violated those rights. While this dimension is important, it will be argued that South Africa's articulation of a justiciable right to access to social security can be used more creatively, along with equality, to advance the interests of disabled work seekers without portraying them as objects of charity.

However, the strategies to enforce obligations to protect, respect, promote and fulfil rights also need to evolve beyond reactive complaints or litigation once harm has eventuated. More pro-active measures to ensure equality have to be considered. In this regard, I discuss the utility of the capability approach, as developed by Amartya Sen and Martha Nussbaum, as well as the enforcement of positive non-discrimination duties, affirmative action duties and government's positive obligations to facilitate access to work.

1.2 Research question

The research question is, "What are the potential synergies and points of friction between social understandings of disability and legal conceptions of equality and social security that seek to promote access to work for disabled persons in South Africa?"

1.3 Research goals

The goals of this research are as follows:

- (i) To examine the ways in which South African equality, labour and social security laws contribute to and inhibit the achievement of the emancipatory goals articulated by disability movements and in disability policies;
- (ii) To analyse the location of legal measures that seek to promote access to work for disabled persons within this emancipatory rubric;
- (iii) To consider the extent to which the imposition of positive legal duties on government and employers to promote access to work for disabled persons can facilitate the transformative change sought by disability movements; and
- (iv) To identify how equality and social security rights can be utilised by disability movements to both influence policy development and implementation to advance access to work for disabled persons and protect their interests through litigation.

1.4 Research objectives

The above goals can be distilled into the following research objectives:

- (i) To examine how, and to what extent, social understandings of disability are reflected in selected South African equality, labour and social security laws that seek to promote access to work for disabled persons;
- (ii) To critically engage with how disability rights discourse, particularly in respect of substantive equality, is implicated in the aspects identified in (i);
- (iii) Bearing in mind the above two objectives, to critically assess to what extent the positive obligations imposed on employers and government in respect of access to work for disabled persons can achieve the contested aims of substantive equality; and
- (iv) To analyse the benefits and weaknesses of potential equality strategies that can be employed to assert disabled persons' rights in the realm of access to work.

1.5 Methodology and literature overview

The study is conducted by virtue of desktop research that involves reference to the following literature:

- (i) Disability studies and other social science texts that articulate and critique social explanations of disability;
- (ii) Literature on rights theories, and disability rights theories in particular;
- (iii) Case law and commentaries on the South African Constitution and its Bill of Rights, in particular;
- (iv) South African labour and social security policies, legislation and case law that are relevant to access to work for disabled persons; and
- (v) Comparative policies, legislation and case law that may assist in the analysis and evaluation of the South African legal frameworks.

The general spirit of the methodology adopted is encapsulated in the following passage that discusses the interrelationship between disability studies and law:²⁵

“Disability Studies [...] offers the law and legal education the opportunity to critically examine the role of ‘normalcy’ within the law and within society, generally. It challenges us to examine our unstated assumptions and requires us to recognize, appreciate, and most importantly, value differences among us. Since law itself is in the business of deciding how to recognize, legitimate, and allocate differences – different rights, responsibilities, resources, and even justice within society – Disability Studies offers an appropriate lens through which we can view the legal profession, and the meaning of difference within the legal system, and society. Conversely, the field of law may also inform the field of Disability Studies by providing a context in which to examine the meaning of differences within our legal and extrajudicial systems. It also may help us to see more clearly issues of power, privilege and participation.”

²⁵ Kanter 405.

This review of social understandings of disability and the conception of rights required by these understandings has a threefold purpose. Firstly, it critically assesses two pillars of disability discourse to ascertain what it can and cannot contribute to the advancement of disabled persons' labour and social security interests in the context of access to work. Secondly, it allows us to clarify some of the normative underpinnings of employment equity and social protection policies for disabled people, which promotes critical consciousness. Thirdly, it also provides us with some standards against which we can benchmark the substantive provisions and the implementation of employment equity and social protection laws.

1.6 Thesis structure and chapter overview

1.6.1 Overall structure

After this introductory chapter, the thesis proceeds to two chapters that set out theoretical debates on disability from the fields of disability studies and South African human rights law, respectively. Chapters 4 and 5 then shift to a discussion of the content and implementation of selected equality laws that affect access to work for disabled persons. The penultimate chapter considers how positive obligations in respect of access to work may be sourced from justiciable socio-economic rights, with a particular focus on the right to access to social security. Finally, Chapter 7 contains my concluding observations and suggestions for future research.

1.6.2 Chapter breakdown

Chapter 2 contains the evolution of understandings of disability; disability in South Africa, particularly as it relates to the legal frameworks for labour and social security; an overview of social understandings of disability and the implications of selected debates within disability studies for labour, equality and social security law. The

focus in Chapter 3 is substantive approaches to equality and how such approaches align with perspectives on social understandings of disability, as discussed in Chapter 2.

Chapter 4 offers a critical analysis of what may be termed employers' duties to refrain from discriminating unfairly in recruitment and selection. This chapter also engages with the conceptualisation of disability for the purpose of identifying and circumscribing a protected class for the purposes of non-discrimination law. Chapter 5 then moves to a discussion of the potential and limitations of positive non-discrimination duties (including reasonable accommodation duties) and affirmative action duties that may promote access to work for disabled work seekers.

Chapter 6 concerns itself with the strategic potential and limitations of justiciable socio-economic rights in promoting access to work for disabled persons who can and want to work. Particular attention is paid to the right of access to social security and how a generous and purposive approach to the scope of this right may lead to a holistic approach to social protection for disabled persons that would include efforts to promote their access to work.

Chapter 7 concludes the study and contains brief reflections on the extent to which the selected laws, policies and enforcement mechanisms incorporate social understandings of disability and how the features of such incorporation may affect endeavours to achieve substantive equality for disabled work seekers. It ends with some suggestions for future research.

1.7 Terminology

It is recognised that power inheres in terminology, for as the writer Toni Morrison has observed, "Definitions belong to the definers, not the defined"²⁶. It is therefore

²⁶ T Morrison. *Beloved*. (1987) 190.

important that disabled persons' perspectives are prioritised when choosing and employing terminology.

The term "disabled people" or "disabled persons" will be used interchangeably with the term "people with disabilities" because there is no consensus among disabled people themselves on the terminology to be preferred. While I am aware of the arguments for people-first terminology²⁷ and that the United Nations (UN) has endorsed this in its Convention on the Rights of Persons with Disabilities (CRPD), some disability activists argue that the phrase "disabled people" also has its advantages in that it offers a direct antonym to "enabled" persons and implies a marginalised, identifiable social category.²⁸

Furthermore, prominent disability activists, particularly those who have championed the social model of disability, have argued that the phrase "person with a disability" obscures the distinction between disability and impairment.²⁹ The former is the result of discrimination and should be opposed, while the latter is a functional limitation, which has to be managed. They also argue that changing terminology will not change the reality of disabled people's lives and the fact that negative connotations continue to attach to functional limitations or bodily difference.³⁰ Given

²⁷ See, for example, C Ngwena. The New Disability Convention: Implications for Disability Equality Norms in the South African Workplace. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) (hereinafter referred to as "Ngwena 'New Disability Convention'") 192 for a brief explanation that such terminology implies "both a relationship with, as well as a separation from, disability" and therefore is an affirmation that disabled persons are part of human diversity.

²⁸ See Ngwena 'New Disability Convention' 183-184, who chooses to use "disabled persons" or "disabled people".

²⁹ V Finkelstein. The Commonality of Disability. In: J Swain, V Finkelstein, S French and M Oliver (eds). *Disabling Barriers, Enabling Environments*. (1993) <http://disability-studies.leeds.ac.uk/files/library/finkelstein-Commonality-of-Disability.pdf>. (Accessed: 6 February 2015)

2. See, also, L Clark and S Marsh. "Patriarchy in the UK: The Language of Disability." (2002) www.leeds.ac.uk/disability-studies/archiveuk/Clark,%20Laurence/language.pdf (Accessed: 6 February 2015) 2 who state, "The British civil rights movement has rejected the term 'people with disabilities', as it implies that the disabling effect rests within the individual person rather than from society. The term 'disabilities' when used in this context refers to a person's medical condition and thus confuses disability with impairment. In addition it denies the political or 'disability identity' which emerges from the disabled people's civil rights movement in a similar way to the Black and Gay political identities".

³⁰ P Abberley. "The Concept of Oppression and the Development of a Social Theory of Disability." (1987) 2(1) *Disability, Handicap and Society* 5 (hereinafter referred to as "Abberley 'Concept of

these debates among disabled people, I will not favour one terminological orientation over another.

The term “work” is used in a wider sense that goes beyond paid employment in the formal labour market. It includes paid work, but also unpaid work within families and communities.³¹ The discussions on non-discrimination laws focus primarily on the duties of employers in the formal labour market to limit the scope of this work and because those laws operate mostly in that sphere. The promotion of access to work as part of social protection, however, starts from the premise that it is necessary to value unpaid work and work in the informal economy to gain a more accurate picture of socially beneficial activities. An expansive notion of work has been advocated by feminist movements as well as Disabled People’s Organisations (DPOs),³² because women and disabled people often perform work that is not recognised socially, politically or economically.

1.8 Limitations of the study

This work is intended to be an audit of the extent to which positive obligations imposed on employers and government in respect of access to work incorporate and

Oppression”) at 8-9 refers to what he terms the “naturalisation of impairment” and the fact that it implies deficiency. He emphasises that he is not suggesting “that perceptions can be changed by changing words,” but that the “entrenched rejection of ‘impairment’ as a viable form of life” and the “‘commonsense’, ‘natural’ and ‘unconscious’ nature of ideologies of impairment, disability and handicap” have to be addressed.

³¹ This is consistent with the notion of work that has been promoted by the International Labour Organisation (ILO). See ILO. *Report of the Director-General: Changing Patterns in the World of Work*. (2006) <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-c.pdf> (Accessed: 6 February 2015) v-vi.

³² See, for example, C Barnes. “A Working Social Model? Disability, Work and Disability Politics in the 21st century.” (2000) 20(4) *Critical Social Policy* 441 (hereinafter referred to as “Barnes ‘Working Social Model?’”) who writes (at 451):

“Indeed, [...] work is a social creation; what is considered work at one point in time may not be perceived as such in another. Moreover, to radically reconceptualize the meaning of work beyond the rigid confines of waged labour is not unprecedented in the modern context. For instance, in its attempt to assert the role of women in a predominantly patriarchal society, the women’s movement has successfully redefined the meaning of work to include housework and childcare. Furthermore, growing evidence suggests that because of the difficulties encountered when trying to balance the requirements of parenthood with those of the workplace, a situation which is especially problematic for those at the foot of the class system, many women are now beginning to seriously question the organization of the modern labour market.”

are consistent with social explanations of disability. These social explanations are debated within disability communities and it would be presumptuous to critique the validity of these explanations here or their value in promoting the interests of disabled people. An attempt is made to relay accurately, yet briefly, the salient features of the conceptual discussions of environmental, social and cultural causes of disability that are ongoing and warrant more attention by people who are more appropriately situated and qualified to express their views.

This study does not include original empirical research and relies on social understandings of disability, as articulated and discussed by disability scholars. Many of these scholars are respected members of international and local disability movements and many of them are disabled themselves. However, theoretical expositions do not (and cannot) capture all the realities of disabled people's lives and are often within the exclusive purview of people who are privileged by virtue of their access to influential social institutions and communities. As a result, the scope of the thesis has been limited to an audit of legal frameworks and provisions for consistency with these views, with the hope that relevant stakeholders, such as DPOs, policymakers and lawmakers, can use it as an input.

A limitation related to the one expressed in the previous paragraph is that this work has, to a considerable extent, generalised disability. This is inevitable, given that law and policy, as well as disability theory, do the same. In my interactions with disabled people, either individually, as well as at conferences and seminars, it is clear that various factors impact on how social measures that seek to improve disabled people's opportunities to participate are experienced.

At one seminar, for example, a woman with a mobility impairment praised the changes in the public train she used and which made it easier for her to get around. Another woman, who had a visual impairment, responded that the signage in the same train, however, was not written in a big enough or bright enough font for her to be able to read it, nor were there voice directions that would inform her as to where she was and where the train would stop next. Every attempt has therefore been

made to remain aware of the danger of generalisations, especially in processes at a micro level, and to emphasise the importance of managing these processes in ways that allow for the expression of a diversity of perspectives and experiences.

Another limitation of the study is that its emphasis is access to work for disabled persons. For reasons of practicality, “access” is used to refer to recruitment and selection processes only. Medical and psychometric testing are not discussed in any great detail.

Finally, as the author of this work, it is relevant for me to disclose that I have experienced functional limitations caused by bodily impairment for the past four years. However, the nature of my impairment (which is not readily visible), my previous access to education, which has influenced the nature of my work, my social class and ready access to medical care have caused me to be able to manage my functional limitations relatively well. This, in turn, has for the most part mediated any discrimination or other negative social, financial or personal consequences I may have experienced in employment or other facets of my life. I am, however, aware that changes to my environment and social circumstances may change my realities.

This thesis is therefore written from the perspective of a lawyer who takes a personal and professional interest in whether the rhetorical approval of social understandings of disability translates into concrete changes in the conception, interpretation, application and enforcement of equality and social security laws that seek to promote access to work for disabled persons.

CHAPTER 2: APPROACHES TO DISABILITY AND THEIR RELEVANCE FOR LABOUR AND SOCIAL SECURITY LAW

2.1 Introduction

The objective of this chapter is to consider how disability has been constructed and to explore the social dimensions of disability, which are said to underpin disability laws and policies at international, regional and domestic levels. Its envisioned outcome is to identify and set out themes that have to be explored in answering the primary research question, namely the extent to which South African equality, labour and social security laws that seek to promote access to work incorporate social explanations of disability and, if so, how they go about doing this.

The chapter proceeds from two central premises. Firstly, understandings of disability have to be situated within their social, economic, political and other contexts in order to ascertain why certain explanations have taken precedence in responses to atypical behaviour, experience and appearance. Although it will not be possible to canvass fully how these contextual factors operate in specific situations, the social contingency of disability is at the heart of any approach that seeks to emphasise social and environmental barriers to disabled persons' participation in various communities of which they are members.

Secondly, it is important that the purpose for which disability is defined in given contexts is considered. Such an approach has various justifications. It would emphasise consistency between policy goals and policy implementation.³³ It is also

³³ The study of congruence between policy goals and implementation is part of implementation studies, a discernible research area within public policy studies. It studies who puts policy into effect, how it is done and why it is done in a particular way (J Schofield. "Time for a Revival? Public Policy Implementation: A Review of the Literature and an Agenda for Future Research." (2001) 3(3) *International Journal of Management Reviews* 245). There are various rationales for studying policy implementation, including the development of ways to explain policy success or failure, predict policy outcomes, recommend policy and policy design norms and unify approaches to the study of activities that are inter-organisational in nature and involve multiple actors (Schofield 247). As LJ O'Toole Jr. "Research on Policy Implementation: Assessment and Prospects." (2000) 10(2) *Journal of Public*

in keeping with a transformative constitutional vision that requires government and private actors to be accountable for transforming our society from one characterised by social exclusion or unfair terms of inclusion to one that constantly seeks to recognise and contribute to the realisation of all people's potential.³⁴ Finally, it is consistent with an approach to legislative interpretation that requires interpreters to give effect to the values of the Constitution within the parameters of the language used in enactments.³⁵

Administration Research and Theory 265 notes, policy implementers "continue to find themselves enmeshed in the vexing challenges of converting policy intent into efficacious action." See, also, PA Sabatier and D Mazmanian. "The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives." (1979) 5(4) *Policy Analysis* 481.

³⁴ For perspectives on the South African constitutional project as one that seeks to transform society, see, inter alia, KE Klare. "Legal Culture and Transformative Constitutionalism." (1998) 14(1) *South African Journal on Human Rights* 146; P Langa. "Transformative Constitutionalism." (2006) 17(3) *Stellenbosch Law Review* 351; A van der Walt. "Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in the Social Transformation Decisions of the Constitutional Court." (2001) 16 *South African Public Law* 1; H Botha. "Metaphoric Reasoning and Transformative Constitutionalism (Part 2)." (2003) *Tydskrif vir die Suid-Afrikaanse Reg* 20; D Moseneke. "Transformative Adjudication." (2002) 18 *South African Journal on Human Rights* 309. Although labour law emphasises the importance of collective bargaining and the speedy resolution of disputes (see S Van Eck. "The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution." (2005) 26(3) *Obiter* 549 at 552), the Constitutional Court in *NEHAWU v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) para 16 stated that the inclusion of a right to fair labour practices in s 23 means that any statute that gives effect to that right must be construed purposively. Ngcobo J noted that if such an approach implies that the Constitutional Court has jurisdiction in all labour matters, such implication is a product of our constitutional democracy, which "envisages the development of a coherent system of law that is shaped by the Constitution."

³⁵ Section 39(2) of the Constitution reads: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 21-26, Langa DP (as he then was) explained the import of this provision. He stressed (at para 23) that "judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section." M Bishop and J Brickhill. "In the Beginning was the Word: The Role of Text in the Interpretation of Statutes." (2012) 129 *South African Law Journal* 681 at 684-685 point out that s 39(2) goes further than just requiring interpreters to choose textually plausible interpretations that are consistent with the Constitution over alternative meanings. It goes further in three ways: Firstly, it mandates that courts must have regard to the purpose and context of legislative provisions, even when the words or phrases are clear and unambiguous. This context is not just of the Act itself or the history of the legislation, but extends to the history of our country, the need to transform our society so as to heal divisions and to build a democratic, open society in which all people's quality of life is treated with equal respect and concern. Secondly, the injunction to promote the spirit, purport and objects of the Bill of Rights goes beyond requiring consistency with specifically enumerated rights. It is possible for a legislative provision not to be in conflict with any of the discrete rights in the Bill of Rights, but to still fall foul of s 39(2) because it conflicts with the spirit, purport and objects of the Bill of Rights as a whole. Thirdly, courts are required to choose an interpretation that best promotes constitutional values, even though there may be more than one. This means that abstract values have to be balanced against one another, which often leads to an all-things considered balancing of disparate factors. Another important feature of the approach mandated by the Constitution is that, even though s 39(2) only references the Bill of Rights, the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009

This chapter is structured as follows: Part 2 briefly traces some material and cultural factors that influenced conceptions of and responses to disability. Part 3 explores the contributions and limitations of purely social understandings of disability and identifies important themes we can use to explore if and how laws and policies incorporate social explanations of disability. Part 4 briefly sets out the general purposes of labour and social security law, after which Part 5 presents a general framework that shows how the themes identified in Part 3 will be used to assess the incorporation of social explanations of disability into work creation and anti-discrimination measures.

2.2 Historical and contemporary influences on conceptions of and responses to disability

Bodies³⁶ that do not conform to stated or unstated ideals have been marked in societies from ancient civilisations to the present.³⁷ Historical reflections on why and how people's appearance, experience or behaviour have been characterised as atypical show that the processes and criteria are dependent on various cultural and material factors.³⁸ These factors include dominant social values, the geographic and natural characteristics of a community, as well as its economic, political, religious and intellectual frameworks and principles.³⁹

The brief noting of material and cultural factors that have influenced conceptions of disability that follows is not intended to traverse the possibilities or the desirability of various articulations of disability, or to discuss which perspectives should be

(1) SA 337 (CC) inferred a duty upon interpreters to choose interpretations that are consistent with and best promote structural provisions within the Constitution.

³⁶ DePoy and Gilson 7 define 'body' as more than just "the flesh container and its organic contents" and the term therefore also includes "the range of human phenomena that derive from bodies in action, thought, belief and experience". "The body is therefore comprised of the sensory body, the emotional body, the spiritual body, the economic body, the productive body, the expressive body, the body of ideas and meanings, and the body in multiple garb and spaces." The advantage of such a widened conception of 'the body' is that it integrates various elements of embodied human experience and it therefore allows for deeper understandings of diversity connected to such experience.

³⁷ DePoy and Gilson 9.

³⁸ C Barnes. A Legacy of Oppression: A History of Disability in Western Culture. In: L Barton and M Oliver (eds). *Disability Studies: Past Present and Future*. (1997) 3-4.

³⁹ DePoy and Gilson 13.

emphasised by equality, labour and social security laws in different contexts. The focus will be on how laws and practices have been shaped by material and cultural factors, with a particular emphasis on Britain and, to a lesser extent, continental Europe. This approach is not intended to reify Western historical perspectives as the only perspectives. Rather, it is underpinned by the recognition that England's Poor Laws influenced social policy and legislation in many countries, including South Africa, a former British colony.⁴⁰

2.2.1 Material and cultural factors that have impacted conceptions of and responses to disability

In early Biblical texts⁴¹, various forms of impairment are mentioned.⁴² Some of these impairments were considered impure and served as valid bases on which to exclude persons with atypical features or characteristics from spiritual community.⁴³ Paradoxically, the positive link between sin and defect then also gave rise to the ethical obligation to provide for disabled persons and ensure their limited inclusion.⁴⁴

⁴⁰ T Van der Merwe. "Events, Views and Ideologies which Shaped Social Security in South Africa." (1997) 12(1-2) *South African Journal of Economic History* 77 at 89 notes: "It comes as no surprise that South Africa, as a British colony, was strongly influenced by British ideas on social security."

⁴¹ BJ Gleeson. "Disability Studies: A Historical Materialist View." (1997) 12(2) *Disability and Society* 179, at 187, warns that it is a fallacy to read "material reality directly from ideological/ religious texts or aesthetical records." However, as E Bredberg. "Writing Disability History: Problems, Perspectives and Sources." (1999) 14(2) *Disability and Society* 189 points out (at 197), text may reflect an attitude, even if it does not confirm a widespread practice.

⁴² Leviticus 21: 16-23 (New King James Version of the Holy Bible) reads: "And the Lord spoke to Moses, saying, 'Speak to Aaron, saying: "No man of your descendants in *succeeding* generations, who has *any* defect, may approach to offer the bread of his God. "For any man who has a defect shall not approach: a man blind or lame, who has a marred *face* or any *limb* too long, "a man who has a broken foot or broken hand, "or is a hunchback or a dwarf, or a *man* who has a defect in his eye, or eczema or scab, or is a eunuch. "No man of the descendants of Aaron the priest, who has a defect, shall come near to offer the offerings made by fire to the Lord. He has a defect; he shall not come near to offer the bread of his God. "He may eat the bread of his God, *both* the most holy and the holy; "only he shall not *go* near the veil or approach the altar, because he has a defect, lest he profane My sanctuaries; for I the Lord sanctify them [emphasis in the original]."

⁴³ H-J Stiker. *A History of Disability* (translated by W Sayers). (1999) 30. Care must be taken not to interpret this as an indication that all disabled persons were excluded from religious practice in early Christianity. Bredberg (at 193) notes that the contrary is apparent from empirical evidence and cites three examples, one of which repudiates the passage in Leviticus cited in the previous footnote. She argues that a more specific account of the settings in which disabled people were "excluded might yield more telling information about both religious practices and social attitudes concerning impairment."

⁴⁴ Stiker 30. He writes: "Two opposing tendencies seem to me to run through the Judaism of the Old Testament: that of violence, sacral order, and religious order, which tends to make the disabled one

Similarly, in Islamic texts, the concept of disability was not referenced, but Arabic terms for specific embodied conditions such as blindness, deafness, leprosy and lameness are used.⁴⁵ Bazna and Hatab note that primary Islamic texts refer to two categories of persons that may today be regarded as having a disability, namely those with physical impairments and those who are socially marginalised.⁴⁶

‘Physical’ impairments were regarded as morally neutral, i.e. not the result of sin or punishment. More space in the Qur’an is devoted to the plight of ‘the disadvantaged’, i.e. those who do not measure up to certain societal standards, including those related to family or tribal ties and origin, and social and economic status.⁴⁷ Obligations are constantly imposed on the whole of society to improve the plight of the disadvantaged.⁴⁸ Furthermore, persons who are unable to comply with specific rituals for good reasons, which may include physical or mental impairments, are often exempted from the duties required of Muslims without negative consequences.⁴⁹

In some early Greco-Roman civilisations, deformed infants were regarded as punishments from the gods and the state had the power to decide whether such infants were to be taken to unknown locations to be drowned or buried alive.⁵⁰ However, responses to atypical bodies varied according to factors such as the reasons proffered for such occurrences, their frequency and the extent of the deviation from the norm.⁵¹ Conditions such as baldness, which were related to

of the expelled victims, and that of ethics and social order, which strives not to contaminate the divine and, in contrast, to assume the obligation to situate the disabled within society.”

⁴⁵ MS Bazna and TA Hatab. “Disability in the Qur’an: The Islamic Alternative to Defining, Viewing, and Relating to Disability.” (2005) 9(1) *Journal of Religion, Disability and Health* 5.

⁴⁶ Bazna and Hatab 23-24.

⁴⁷ Bazna and Hatab 24.

⁴⁸ Ibid.

⁴⁹ See, for example, V Rispler-Chaim. *Disability in Islamic Law*. (2007) 19-42 for a discussion of accommodations for disabled persons who are unable to comply with some or all of the requirements for the performance of certain religious duties (daily prayers, the fast of Ramadan, the Hajj and almsgiving). Most of these requirements relate to the “state of purity and cleanliness” (at 19) of the believer. In some instances, alternative methods of purifications or other concessions are allowed. It is also notable that responses to persons with intellectual, neurological or psychosocial impairments vary in that there are different schools of thought on whether to recognise their performance of some religious duties (at 20).

⁵⁰ Stiker 39-40; DePoy and Gilson 12.

⁵¹ DePoy and Gilson 12.

weakness, were tolerated, although not valued.⁵² At the positive end of the spectrum, Hephaestus, the god of fire, was mobility-impaired, but was portrayed as having extraordinary, magical power.⁵³ Thus, it would appear that in the city-states of Ancient Greece, certain atypical characteristics were accepted and met with supportive societal responses, while others were not tolerated at all.

There are varying accounts of responses to disability during the medieval period. In terms of economic and social structures, feudalism consisted of a landlord subdividing his property into smaller portions that would be farmed by serfs or tenants.⁵⁴ Every peasant who was homeless was required to work for a landlord in return for basic forms of support. While serfs could not own property and could be bought and sold as property, they had paternalistic insurance against unemployment, sickness and old age.⁵⁵ The state therefore felt no need to regulate the working and non-working poor. However, that changed when slavery-serfdom was replaced by capitalism and the Bubonic Plague caused severe labour shortages.⁵⁶

With the demise of feudalism, the Church became the primary administrative body in control of poor relief. The seeds for faith-based hospitals were sown, as members of the clergy in Christian and Islamic communities, as well as Buddhist monks in the Far East, were involved in giving medical care to those considered to be ill.⁵⁷ However, the canonical approach did not focus as much on social control as it did on the spiritual rewards that resulted from showing charity to the 'less fortunate'.⁵⁸ As the economic and social burdens from the demise of feudalism became overwhelming, states in Europe stepped in and regulated the poor more stringently.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ WP Quigley. "Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor." (1996) 30(1) *Akron Law Review* 75.

⁵⁵ Quigley 76.

⁵⁶ Quigley 83 writes that the Bubonic Plague of 1348-1349 and famine killed a third of the English population, which created a severe labour shortage. This broke down the feudal system and the liberated serfs roamed the country as beggars, vagrants and migratory workers. See, also, F Fox Piven and RA Cloward. *Regulating the Poor: The Functions of Public Welfare* (1993) 8.

⁵⁷ DePoy and Gilson 16. These authors note that through the work of St Francis of Assisi, "the suffering of the poor and sick [...] gave a moral role to the recipients of care as well as those providing care."

⁵⁸ Stiker 67.

Fear of the poor saw such 'risky' persons increasingly being confined in alms houses.⁵⁹ The disabled person had the status of the "cared-for, integrated marginalized",⁶⁰ a status that still persists in many contemporary communities.

It is in the mid-1300s that the distinction between deserving and non-deserving poor people was first enshrined in legislation in England with the Statute of Labourers of 1349-1350.⁶¹ These measures were taken in response to the severe labour shortages caused by the Black Plague and famine.⁶² As a result, the Statute legislated compulsory work, reduced compensation, set wage caps and provided for imprisonment if workers stopped working before their contracts came to an end and strict judicial enforcement through a special system.⁶³ The relevance of the Statute for our understanding of disability is that it began with a method to prevent able-bodied persons from begging:

"It mandated every man or woman under 60 who is 'free or bond, able in body' and who does not have a job or their own home, 'shall be bounden to serve him which so shall him require.' Everyone able bodied under 60 was required to work."⁶⁴

Similar measures were contained in the 1388, 1495 and 1504 versions of the Poor Laws.⁶⁵

The identification of disability therefore had implications for the size of the labour force during a period of severe labour shortages. Up until 1563, the Church, although less powerful, had still played an important role in providing assistance to the poor. However, Henry VIII, after the Protestant Reformation, dissolved all the monasteries and many poor people who had been cared for in and by these monasteries were now destitute.⁶⁶ The English Poor Law of 1563 was the first

⁵⁹ Ibid.

⁶⁰ Stiker 69. He goes on (at 73) to trace the role of religious organisations in controlling the lives of the poor and cites the example of Zotikos, who was martyred in the early Christian era for having cared for lepers, and St Francis of Assisi, who began his life after conversion by kissing lepers.

⁶¹ Quigley 87-88.

⁶² Ibid.

⁶³ Quigley 85.

⁶⁴ Ibid.

⁶⁵ Quigley 95.

⁶⁶ Quigley 95.

legislative instrument in England that attempted comprehensive regulation of the poor and contained severe punishments for unauthorised beggars.⁶⁷ As with the first Poor Laws in 1349-1350, there was a clear distinction between the deserving and undeserving poor.

During the Enlightenment period, it became more common for the poor to be institutionalised. The reasons for such internment are complex, but at least one of these reasons was to maintain social control. Disabled people who were poor would have been institutionalised, as were specific categories of disabled people. One example of the latter is offered by Stiker, who relates the situations of disabled war veterans in France, who were accommodated in the Hôtel des Invalides, approved by Louis XIV in 1674.⁶⁸ Since not all these veterans were in Paris and many did not want to live sedentary lives, various detached companies were created in remote locations on French border outposts. By 1702, there were 61 such companies. However, financial and disciplinary difficulties led to these companies for war veterans being populated on a merit-based system in terms of a 1724 ordinance.

Although these internments were not occasioned by force, the intention was to prevent delinquency while providing care. The veterans were also expected to work. They manufactured shoes and tapestries and cut material for clothing. This labour was part of a growing trend to put the poor to work and this formula was exported as far as Canada, where workshops for the disabled were set up in Quebec.

The Enlightenment period also saw a shift from belief in the supernatural to the systematic study of observable phenomena, an important example being Francis Bacon's 1605 publication, *Of the Proficiency and Advancement of Learning, Divine and Human*.⁶⁹ Leonardo Da Vinci's Vitruvian Man also became the embodiment of the perfect human form upon which function and architecture are built to this day,

⁶⁷ See Quigley 96-103 for an exposition of the main features of all the Poor Laws from 1536 to 1601.

⁶⁸ Stiker 100-102.

⁶⁹ DePoy and Gilson 18.

even though it is not an accurate representation of the average person's physical proportions.⁷⁰

As the explanations for atypical behaviour, experience and appearance became more complex and religious hegemony receded to allow for analyses influenced by economic and social factors, a disproportionate number of poor people were classified as having atypical characteristics.⁷¹ Medicine was still in its infancy, so informal social arrangements did not always reflect a distinction in treatment between those who were atypical due to poverty and those who were atypical due to illness.⁷²

It is clear that economic means mediated the consequences of atypical behaviour or appearance. Nobility who were eccentric, for example, would have had the possibility of inheriting family fortunes and had access to resources,⁷³ while

⁷⁰ B Borson. "Scale and Proportion: The Architect's Domain." (2013) <http://www.lifeofanarchitect.com/scale-and-proportion-the-architects-domain/> (Accessed: 6 February 2015) notes: "The drawing is based on the correlations of ideal human proportions with geometry described by the ancient Roman architect Vitruvius in Book III of his treatise 'De Architectura'." In *The Ten Books of Architecture*, written circa 25BC, at 3.1.2-3 Vitruvius Pollio (referred to as Vitruvius) writes (translation by MH Morgan available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0073%3Abook%3D3%3Achapter%3D1%3Asection%3D2> (Accessed: 6 February 2015):

"For the human body is so designed by nature that the face, from the chin to the top of the forehead and the lowest roots of the hair, is a tenth part of the whole height; the open hand from the wrist to the tip of the middle finger is just the same; the head from the chin to the crown is an eighth, and with the neck and shoulder from the top of the breast to the lowest roots of the hair is a sixth; from the middle of the breast to the summit of the crown is a fourth. If we take the height of the face itself, the distance from the bottom of the chin to the underside of the nostrils is one third of it; the nose from the underside of the nostrils to a line between the eyebrows is the same; from there to the lowest roots of the hair is also a third, comprising the forehead. The length of the foot is one sixth of the height of the body; of the forearm, one fourth; and the breadth of the breast is also one fourth."

S Gilson and E DePoy. "Da Vinci's Ill-Fated Design Legacy: Homogenization and Standardization." (2007) 5(7) *International Journal of the Humanities* 148 write that one of the most influential modern architects, Le Corbusier, used the golden ratio developed by Vitruvius and operationalised by Da Vinci as the human standard around which to build urban environments. Unfortunately, so they argue, this standard is not realistic. The Vitruvian Man is typically 8 heads tall, whereas the average person is 7½ or even 6½ heads tall. They note (at 149): "The use of these exaggerated male standards as the basis for fashioning environments and products literally design 'who is in' and 'who is out', who can function and who cannot, who is desirable for a space or product and who is not." They therefore advocate (at 150) for "an international, interdisciplinary design field that responds to user needs, sustainability and technologies to solve the problems of human life."

⁷¹ DePoy and Gilson 19.

⁷² DePoy and Gilson 20.

⁷³ CJ Kudlick. "Disability History: Why We Need Another 'Other'." (2003) 108 *American Historical Review* 763 at 773-774 briefly reviews a book about Hugh Blair of Borgue, an autistic boy born to a

eccentrics in the lower classes were more likely to have been locked up in asylums with others who were considered 'mad' or aberrant in other ways.⁷⁴ Similarly, Bredberg warns that the experience of blindness, to name but one example, was markedly different for lower- and upper-class Victorians.⁷⁵

During the Victorian era, Quetelet constructed 'the average man', an idea that still animates not only disability theory and practice, but the sciences more generally.⁷⁶ Beirne summarises the import of this idea:⁷⁷

"In the early 1840s, especially after he became acquainted with the probabilistic error function in celestial mechanics, Quetelet insisted on the need to present not only the mean of a scale of given characteristics but also the upper and lower limits between which individuals oscillated. Minor or "natural" variation around the mean was then identified by Quetelet as deviation that should attract no unusual attention; extraordinary variation (e.g., the height of giants and dwarfs) he saw as "preternatural. . . monstrous" [...]. In addition, Quetelet perceived that variation around the mean occurred not randomly but in a determinate order that approximated the principle of the normal distribution in celestial mechanics. This principle, he now surmised, was also applicable to the distribution of all the nonphysical qualities of man."

The combination of 'the average man' and probability theory thus led to observation becoming prescription.⁷⁸ When industrialisation and mass production started, mechanisation and standardisation were based on what the average person ought to be able to do in given circumstances:⁷⁹

wealthy Scottish Family in the early 1700s. His brother applied to court to have him legally declared ineligible to inherit the family fortune and his mother wanted to arrange a suitable marriage for him. The book describes his relationships with his family, neighbours and the community, which implies that he was not isolated socially. DePoy and Gilson 19 also point out that where treatments for the atypical existed, these were available to those who could pay.

⁷⁴ Stiker 110.

⁷⁵ Bredberg 198.

⁷⁶ DePoy and Gilson 22; P. Beirne. "Adolphe Quetelet and the Origins of Positivist Criminology." (1987) 92(5) *American Journal of Sociology* 1140.

⁷⁷ Beirne 1159.

⁷⁸ DePoy and Gilson 22.

⁷⁹ DePoy and Gilson 23. See, also, Finkelstein 11, who notes that one view, which he first espoused in 1980, is that the predominant factor in the disablement of groups of people is how people can participate in the creation of social wealth. During times of small-scale manufacturing that people

“As industrialization advanced and associated economic productivity with legitimate goodness, links between standardized expectations, moral judgment, unemployment, and disproportionate poverty among people with activity, appearance, and/or experiential differences further located legitimacy of explanations in terms of productivity. The attribution of “not” normal activity, appearance, and experience to assumed productivity limitation was and remains an important determination of current disability legitimacy.”

As the 20th century progressed, the hegemony of ‘normality’, together with the rise of professional authority had a major impact on the way in which disability was conceived. Stiker argues that after the First World War, the rise of the ‘mental’ asylum led to psychiatrists becoming ‘experts’ on madness and leaders of institutions for people who were essentially without rights.⁸⁰ People with physical impairments were not in the asylums, but were often also institutionalised, unless their impairments could be used practically or for profit.⁸¹ He argues that as rehabilitation and medicalisation gained ground, the “disabled were no longer simply the poor.”⁸²

O’Brien notes that in the United States of America (USA) in the mid-1900s, the rehabilitation centre sought to replace asylums and institutions for persons with physical impairments.⁸³ Such centres were typically staffed by “an interdisciplinary team of experts, which ideally included a psychiatrist, a physician, social workers, occupational and physical therapists, vocational rehabilitation experts *and* even an anthropologist” [emphasis in the original].⁸⁴ This team would make a collective diagnosis, but the central assumption was that people with impairments were ‘maladjusted’ and that their role as professionals was to help impaired individuals

could undertake in their homes, with single-person forms of transportation and small markets where people could exchange goods, it would have been possible for people with diverse attributes to participate in social wealth creation. However, with the advent of more advanced machinery that was increasingly built to be operated by ‘normal’ people, many people were excluded.

⁸⁰ Stiker 138.

⁸¹ Stiker 139.

⁸² Ibid.

⁸³ R O’Brien. *Crippled Justice: The History of Modern Disability Policy in the Workplace*. (2002) 7.

⁸⁴ O’Brien 8.

become closer to Quetelet's 'average man', particularly with a view to increase their employability.⁸⁵

The above developments in the global North would have seeped into the attitudes and practices of those who administered the colonies that were being set up. Jan Van Riebeeck, who arrived in South Africa in 1652 to set up a refreshment post, documented the first count of Europeans in December of that year. All people, except women and children, were listed by occupation, including those who drew pay but were "sick generally in bed and many lazy idlers who do little work and who it would be better to discharge."⁸⁶ It is clear from this passage that there was a distinction between those who could not work due to illness and those who did not work because they were "lazy".

This distinction between the deserving and the undeserving poor has animated the provision of social security in South Africa for a long time. It fits in well with two main historical influences: the British Poor Law tradition that viewed unemployment as a moral problem and free-market liberalism with its distrust of government intervention.⁸⁷ However, the continental European influence did allow for government intervention.⁸⁸ These interventions were initially carried out by ordinary people who became deacons in the church and who then had to take care of the poor, a system developed by John Calvin in Geneva.⁸⁹

Disabled persons who qualified for benefits were provided for, first by the church and then by government, mostly in the form of cash transfers or grants. Formal social

⁸⁵ Ibid.

⁸⁶ See M Nkosi. *Mining Deep: The Origins of the Labour Structure in South Africa*. (2011) 4.

⁸⁷ Van der Merwe 101.

⁸⁸ S Van der Berg. "South African Social Security under Apartheid and Beyond." (1997) 14(4) *Development Southern Africa* 481 at 485 asserts that one of the interesting aspects of the development of social security in South Africa is

"the tension between the liberal Anglo-Saxon laissez-faire position, which is sceptical of social security, and continental European influences, which are more supportive of it [....] The latter were dominant in the old Boer Republics and in the pre-British Cape Colony, and came to the fore again under Afrikaner nationalist rule, but then with a racial bias; laissez-faire enjoyed stronger support under direct British rule and later from the predominantly English business class."

⁸⁹ Van der Merwe 79.

security started in 1665 when the Church and the Dutch East India Company partnered to provide cash benefits, food, clothes and housing to people in need, including disabled persons.⁹⁰ Furthermore, disabled persons, the elderly and displaced individuals were often placed in the care of other households.⁹¹

Although British rule was characterised by a reticence to provide poor relief, the Cape Province enacted the Masters and Servants Act⁹² in 1856. This Act and related legislation provided for the care of destitute children, physically disabled persons and the poor.⁹³ The Church was still heavily involved in social welfare and, after 1880, helped to establish, inter alia, institutions for disabled persons.⁹⁴ In the Boer Republics, a more interventionist approach was followed, with an emphasis on relief to poor White persons, including public works programmes to provide short-term employment.⁹⁵

When the Union of South Africa was formed, social welfare was regarded as a provincial matter, but the national government took over this function from the provinces, with the exception of Natal, in 1940.⁹⁶ The emphasis was on in-kind benefits for which recipients had to return some service and it was made clear that assistance was to be made as unattractive as possible.⁹⁷ Assistance to physically disabled persons persisted, though, and in 1946 the first Disability Grants Act was passed.⁹⁸ The government refused to take a structural approach to social welfare, however, and the default was for individuals to take care of themselves.⁹⁹

It is clear that within the South African social security system, classification as disabled was, and still is, one means through which to gain access to benefits as a

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Act 15 of 1856.

⁹³ BW McKendrick. *Introduction to Social Work in South Africa*. (1990) 9.

⁹⁴ Van der Merwe 84.

⁹⁵ Van der Merwe 89.

⁹⁶ Van der Merwe 92.

⁹⁷ Ibid.

⁹⁸ Act 36 of 1946.

⁹⁹ McKendrick notes (at 22): "State policy, often stated in parliamentary speeches and in the official government documents, is that the major onus for human well-being lies with the person himself, his family and the community."

‘deserving’ poor person. Historically, these benefits were provided within a framework of charity or philanthropy. By the time the UN Year of Disabled Persons, 1986, arrived, the South African Coordination Committee drafted a report¹⁰⁰ that was framed in largely medicalised, paternalistic terms,¹⁰¹ but progress was apparent in the recognition of some social factors in the causes of disablement.¹⁰²

The summary of recommendations included reference to the development of education, training and work opportunities for disabled persons,¹⁰³ as well as to “equal opportunities in both the open and sheltered labour market which must be recognised, and physical accessibility of the work environment which must be ensured.”¹⁰⁴ However, the Committee stated that it did not recommend “[t]he adoption and integration of a human rights charter for disabled people in legislation.” The equalisation of opportunities was therefore not suggested in terms of a rights-based framework and was therefore dependent on the benevolence of powerful economic, political and social actors.

The Report recognised that many disabled persons were confined to institutions “their condition [did] not justify.”¹⁰⁵ Institutionalisation of those deemed to have intellectual or psychosocial impairments, in particular, used to be the norm, but a process of de-institutionalisation, coupled with the development of community-based care, has commenced.¹⁰⁶ The Mental Health Care Act¹⁰⁷ (MHCA) now rests on

¹⁰⁰ Department of National Health and Population Development. *Disability in the Republic of South Africa: Main Report Volume 1*. (1987) (hereinafter referred to as “Disability in South Africa Report”).

¹⁰¹ Disability in South Africa Report Chapter 5 (at 23) is titled “National Policy for Disabled Care”, while Chapter 6 (at 27) is headed “Structure for the Care of the Disabled”. Chapter 2 (at 5-8), which seeks to address ethical concerns relating to disability, focuses primarily on “effective care of the disabled”.

¹⁰² “Factors responsible for disablement” (Disability in South Africa Report Item 3.8 at 11) were listed as including “[a]n absence of accurate knowledge about disability, its causes, prevention and treatment. This includes stigma, discrimination and misconceptions of disability”; “[c]onstraints, including a lack of resources, geographical distance, physical and social barriers that make it impossible for many people to take advantage of available services”; and “[l]ow priority in social and economic development for activities related to equalisation of opportunities, rehabilitation and the prevention of disability.”

¹⁰³ Disability in South Africa Report Item 7.2.6.2 (a)-(f) at 32.

¹⁰⁴ Disability in South Africa Report Item 7.2.6.2 (g) at 32.

¹⁰⁵ Disability in South Africa Report Item 3.7.3 at 10.

¹⁰⁶ R Lazarus. “Managing De-Institutionalisation in a Context of Change: The Case of Gauteng, South Africa: Review Article.” (2005) 8(2) *South African Psychiatry Review* 65 at 66. He notes that despite evidence of extreme deficiencies in institutionalised care, some concerns about de-institutionalisation include “indiscriminate discharges”, “inadequate family and community preparation and support”,

three pillars, namely the human rights of mental health care users, an emphasis on integrated care involving the community at large, and the safety of the public.¹⁰⁸ Commentators have expressed concerns about the implementation of the MHCA, specifically in relation to “indiscriminate discharges, inadequate family and community preparation and support, inadequate community resources, inadequate continuity of mental health care, revolving door admissions and discharges, neglect and abuse, and homelessness.”¹⁰⁹

From the above, it is clear that a host of both material and cultural factors, such as the nature of the impairment, the economic policies and structures within a particular society, technological development, interpretations of religious texts and predominant intellectual traditions and social structures, to name but a few, have all had an impact on and continue to influence the conception and interpretation of embodied difference and societal responses to such difference.

For our purposes, we will take specific interest in working definitions of disability. These are the definitions used in policies and laws to inform decisions on whether individuals or groups need to be socially protected, in work and non-work contexts, or should benefit from social programmes that benefit disabled persons directly or indirectly.

“inadequate community resources”, “inadequate continuity of mental health care”, “revolving door admissions and discharges”, “neglect and abuse” and “homelessness”.

¹⁰⁷ Act 17 of 2002.

¹⁰⁸ M Freeman. “New Mental Health Legislation in South Africa – Principles and Practicalities: A View from the Department of Health.” (2002) 5(3) *South African Psychiatry Review* 4. The author stresses (at 7) that the third component, namely the safety of the public, is relevant only in a minority of cases, as “most people with mental illness are not violent or even prone to violence.”

¹⁰⁹ See fn 106. See, also, E Kock. *De-Institutionalisation of People with Mental Illness and Intellectual Disability: The Family Perspective*. (2009) 7 and AA Landman and WJ Landman. *A Practitioner's Guide to the Mental Health Care Act*. (2014) 10, who caution that the “implementation of the MHCA is hindered by budgetary constraints, lack of facilities causing premature discharge of users, and structural and logistical difficulties.”

2.2.2. Working definitions of disability

Grönvik, in his work on definitions of disability in the social sciences, displays a photograph of a body, with the person's head and face 'cut off', in a wheelchair at the bottom of a flight of stairs and then proceeded to explain that the photograph could be seen to reflect no less than five conceptions of disability.¹¹⁰ Firstly, the everyday conception is that the person is disabled because he or she is in a wheelchair and cannot walk up the stairs. This is a functional definition. The second possibility is to conceive of disability as a result of the interaction between a person with impairment and his or her environment, i.e. the person in the wheelchair cannot get up the stairs. This is a relative or environmental definition of disability.

The third possible definition is that the stairs are the reason why the person is disabled, with no reference to the person in the wheelchair at all. Social barriers prevent people with impairments from participating in society and these barriers are the only causes of disability. This definition is often referred to as 'the social model of disability'. One may also see that the person is in a wheelchair and therefore has access to a mobility aid, for which he or she may have had to apply. As a result, he or she must have met some administrative definition of disability. This is the fourth definition. The fifth definition may arise if someone looking at the picture were to ask whether, even if other people or administrative systems regard the person as disabled, the person regards himself or herself as disabled. This would be a subjective definition of disability.

Grönvik points out that the complexity of what we mean by disability does not end with these five potential conceptions.¹¹¹ The intersections of disability and various other identity markers such as gender, race, class, sexual orientation and nationality mean that regardless of the definition of disability one uses, people's experiences of disability will vary. Laws and policies therefore have to be sensitive to these lived experiences as influenced by complex, intersecting personal, environmental and

¹¹⁰ L Grönvik. *Definitions of Disability in Social Sciences: Methodological Perspectives*. (2007) 11-12.

¹¹¹ Grönvik 12.

social variables. The complexity also compels us to clarify why we are interested in disability in specific instances – the focus may be on people’s bodies, the built environment, bureaucratic systems, social movements or a combination of these.¹¹²

Within international rights bodies such as the UN and within many domestic systems worldwide, including that of South Africa, it has been recognised that there has been a shift from functional definitions of disability that focus on the individual to relative or environmental definitions that regard disability as the result of interactions between a person said to have an impairment and his or her environment. The UN Convention on the Rights of Persons with Disabilities (CRPD), for example, seems to endorse the latter definition. The choice of definition for anti-discrimination law is discussed in Chapter 4.¹¹³ For now, the focus will be on the theoretical and operational implications of the conceptual complexity of disability.

Before we explore social explanations any further, some preliminary observations about models and theories may be apposite. The social model of disability is not a social theory. A theory aims to explain “how and why specific relationships lead to specific events”¹¹⁴ and therefore claims to offer “a limited and fairly precise picture”.¹¹⁵ In contrast, a model can at best be more or less useful, for “models are merely ways to help us to better understand the world, or those bits of it under scrutiny. If we expect models to explain, rather than aid understanding, they are bound to be found wanting.”¹¹⁶

A further cautionary observation relates to the overall usefulness of models. Ultimately, the aim should not be the development of distinct models, but rather the evolution of critical understandings of disability as a social construct manifested in

¹¹² Ibid.

¹¹³ See 4.4.4.

¹¹⁴ JG Wacker. “A Definition of Theory: Research Guidelines for Different Theory-Building Research Methods in Operations Management.” (1998) 16(3) *Journal of Operations Management* 361 at 364.

¹¹⁵ MS Poole and AH Van de Ven. “Using Paradox to Build Management and Organization Theories.” (1989) 14(4) *Academy of Management Review* 562.

¹¹⁶ See M Oliver. *Understanding Disability: From Theory to Practice*. (1996) (hereinafter referred to as “Oliver ‘Understanding Disability’”) 40.

people's lived experiences.¹¹⁷ For this reason, understandings of disability may be informed by various models originating from different disciplines or by gaps left by existing disciplines.¹¹⁸

Models may overlap and the usefulness of particular models may vary from one instance to another, depending on factors such as the purpose of explaining disability and the contexts in which it is explained. Contemporary and emerging explanations of disability may require radical changes to be made to social processes and institutions, some or all of which may be established and maintained by law. It is against the backdrop of these general remarks that some critiques of social explanations are now considered.

2.3 The move towards social explanations of disability

The social model of disability has gained traction in recent decades at an international level and in many domestic jurisdictions, including South Africa. In Western Europe, the social model has its genesis in the work of British activists who, in 1976, wrote:

“In our view, it is society which disables... Disability is something imposed on top of our impairments; by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.”¹¹⁹

¹¹⁷ M Oliver. “The Individual and Social Models of Disability.” (1990) <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> (Accessed: 6 February 2015) 2 warns that technical, semantic debates should not obscure the real issues, which relate to oppression, discrimination, inequality and poverty.

¹¹⁸ See Kanter (2010-2011) at 419. On the subject of disability studies, she writes that many scholars view various models of disability as part of an overall model that regards disability as a social construct. While there may be some scholars who reject some of these models as inaccurate, the point remains that the medical, individual model of disability ought not to be the sole model through which to understand disability.

¹¹⁹ Quoted in Priestley ‘Disability Studies Programmes’ 22. MS Holmes. *Fictions of Afflictions: Physical Disability in Victorian Culture*. (2004) 7-11 suggests that Victorian literature contained perspectives that hinted at social explanations of disability.

The focus of the social model is therefore on all things that restrict disabled people, “ranging from individual prejudice to institutional discrimination, from inaccessible buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure as discrimination institutionalised throughout society.”¹²⁰

While the classical articulations of the social model recognise that impairment, i.e. a partial or total loss of physical or mental functions, may be important in terms of describing the state of a person’s body, these do not recognise bodily impairment as the cause of disability.¹²¹ The restrictions imposed on persons with disabilities by impairment are thus not emphasised, and the model focuses rather on the ways in which society erects barriers to the full participation and advancement of disabled persons.

There are many variations in emphasis in explanations of disability that can plausibly fall under the umbrella of social explanations, or alternatively, non-individual models of disability. In legal discourse, the minority group model, which was developed in North America, has been popular. This model views disabled persons as being part of an oppressed group in society who have suffered and are suffering systemic discrimination and social exclusion in similar ways to groups who are marginalised based on their race, gender, sexual orientation or other characteristics.¹²² The focus is therefore on identity and power relations in society.

Activists first used the social model as a strategy. Their primary objective was to debunk the overwhelmingly accepted starting point that disability is a personal tragedy and that sufferers either have to be fixed or exist as objects of charity.¹²³ They specifically sought to challenge the hegemony of Western bio-medical

¹²⁰ See Oliver ‘Understanding Disability’ 33 and Marks 3.

¹²¹ See Oliver ‘Understanding Disability’ 35 and Oliver ‘Disablement’ 11.

¹²² Kanter 421-422.

¹²³ Ibid.

discourses in the explanation of disability, which they argued labelled disabled people with disembodied medical categories and served to pathologise disability while blaming disabled people for their conditions.¹²⁴

The social model's primary message was simple and could be conveyed easily – society should look in the mirror when seeking the causes of disability, instead of evaluating individuals against 'objective', 'medical' standards developed by mainstream society.¹²⁵ Less attention has been paid to the ways in which a social model, together with other models and theories, can impact on the construction of disability for purposes of social policy and the law.

In South Africa, the disability movement has been influenced heavily by developments at international level,¹²⁶ as well as resistance to apartheid. Kathy Jagoe, an activist involved in the formation of Disabled People South Africa (DPSA), explains that the disability movement in the 1980s was influenced by the Black Consciousness Movement in two respects: firstly, the importance of self-representation was emphasised – disabled persons had to voice their own experiences and drive their own emancipation; and secondly, the marginalisation and deprivation experienced by people with disabilities were caused by the society in which they lived.¹²⁷

Disabled People South Africa's initiatives were twofold, namely a political struggle in which disabled people claimed their rights, and a developmental project that sought

¹²⁴ R Imrie. "Demystifying Disability: A Review of the *International Classification of Functioning, Disability and Health*." (2004) 26(3) *Sociology of Health and Illness* 290.

¹²⁵ See Kanter 420.

¹²⁶ Mike Du Toit, who later became the Secretary-General of Disabled People South Africa (DPSA), had attended the international conference of Rehabilitation International, at which disability activists walked out after their insistence that 50% of the Board of that organisation should be disabled persons was rejected. This major change saw the formation of Disabled Peoples International, with the emphasis being on self-representation (Recounted in C Howell, S Chalklen and T Alberts. A History of the Disability Rights Movement in South Africa. In: Watermeyer, B; Swartz, L; Lorenzo, T; Schneider, M and Priestley, M (eds). *Disability and Social Change: A South African Agenda*. (2006) 49).

¹²⁷ Howell, Chalklen and Alberts 50.

to generate income through self-help.¹²⁸ It was also felt that disabled people's struggles could not be separated from the fight against apartheid, which is why DPSA located itself within the mass anti-apartheid movement and built relationships with many other civil society organisations.¹²⁹ As early as 1990, DPSA met with the African National Congress (ANC) as the government-in-waiting and encouraged the inclusion of disability issues in that party's position papers and other documents.¹³⁰ This collaboration is apparent from the ANC's draft Bill of Rights of 1993, which specifically mentions the role of DPSA in framing disabled persons' rights.¹³¹

One of the milestones for the disability rights movement was the adoption of a Disability Rights Charter in 1992. The Charter was the result of a human rights advocacy campaign driven by Lawyers for Human Rights.¹³² This campaign's primary purpose was 'to mobilise opinion from disabled people themselves, based on their life experiences, to shape national policy and thinking on disability'.¹³³ The campaign was so successful that it spawned a protest march by disabled people against the marginalisation and discrimination they experienced.¹³⁴ The Charter was steeped in a human rights approach with the ultimate objective of building a society in which disabled persons would have their basic needs met and could live independently and free from discrimination, exploitation and abuse.¹³⁵

The human rights and development approach taken by the South African disability movement is, at the macro level, consistent with the social model of disability, because the central claim of the latter is that disability is caused wholly or

¹²⁸ W Rowland. *Nothing About Us Without Us: Inside the Disability Rights Movement of South Africa*. (2004). See also Howell, Chalklen and Alberts 54.

¹²⁹ Howell, Chalklen and Alberts 54.

¹³⁰ Howell, Chalklen and Alberts 56.

¹³¹ ANC. "A Bill of Rights for a New South Africa." (1993) <http://www.anc.org.za/show.php?id=231> (Accessed: 6 February 2015) (hereinafter referred to as "ANC 'Bill of Rights'"). A note to article 9, which deals with disabled persons' rights, reads:

"This addition is in line with recommendations by the Disabled People of South Africa, which is actively promoting discussion amongst disabled people on their future constitutional rights, and which points out that there are nine million disabled persons in our country."

The relevance of this article to the interpretation of disabled persons' constitutional rights is discussed in Chapter 6 (see 6.2.3.2).

¹³² Howell, Chalklen and Alberts 57.

¹³³ M Masutha cited in Howell, Chalklen and Alberts 57.

¹³⁴ Howell, Chalklen and Alberts 57.

¹³⁵ The INDS Chapter 2.

substantially by social and environmental barriers that prevent disabled people from living independently and participating in their communities. However, we would do well to examine the scope of social understandings of disability and consider what these can and cannot contribute to social policy, as well as legal theory and practice.

2.3.1 Scope of and issues raised by social understandings of disability

Various critiques of the social model of disability and of social understandings in general, are discernible. The objective here is not an exhaustive discussion of the advantages and disadvantages of such understandings, but an assessment of what these offer policymakers and legislators, particularly within the realm of equality, labour and social security law.

2.3.1.1 The body, its environment and the interrelationship between these

Social understandings of disability vary in the degree to which disability is attributed to social and environmental factors. Oliver's statement that "disability is wholly and exclusively social"¹³⁶ is perhaps the most extreme variation. Yet, even he points out that the social model is not meant to deal with the personal restrictions caused by impairments.¹³⁷

The distinction between impairment and disability has been explained thus:

"Impairment: Lacking part or all of a limb, or having a defective limb, organism or mechanism of the body; Disability: The disadvantage or restriction of activity caused by a contemporary social organisation which takes no or little account of people who have physical impairments and thus excludes them from the mainstream of social activities."¹³⁸

¹³⁶ See Oliver 'Understanding Disability' 35.

¹³⁷ See M Oliver. "Defining Impairment and Disability: Issues at Stake." (1996) www.disability.co.uk/sites/default/files/resources/ex%20div%20ch3.pdf (Accessed: 6 February 2015)

11.

¹³⁸ See Oliver 'Disablement' 11.

Various disability scholars argue that this dualistic distinction between the body and its material and social environment is untenable. Hughes and Paterson recognise that while impairment has not been completely ignored by disability activists, theoretical emphasis on social relations and processes and the environment has meant that the impaired body has been treated as “an ahistorical, pre-social, purely natural object” instead of as a component of “history, culture and meaning.”¹³⁹ These authors represent the binaries created by this approach in the following table:¹⁴⁰

Table I: Binaries created by separation of the body from its environment

The biological	The social
Impairment	Disability
The body	Society
Medicine	Politics
Therapy	Emancipation
Pain	Oppression
The medical model	The social model

Each binary couple along the horizontal axis excludes its opposite, but each concept includes the same terrains that are represented on the same vertical axis. Within this scheme, “[t]he relationship of disabled people to their bodies is mediated by medicine and therapy, and has nothing to do with policy and politics.”¹⁴¹ Hughes and Paterson argue that by ceding the body to medicine in this way, the classical articulation of the social model means that “medicine is the sole master of the language of impairment and it acquires this sovereignty through its power to name bodily dysfunctions.”¹⁴²

¹³⁹ B Hughes and K Paterson. “The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment.” (1997) 12(3) *Disability and Society* 326.

¹⁴⁰ Hughes and Paterson 330.

¹⁴¹ Hughes and Paterson 331.

¹⁴² Hughes and Paterson 333.

However, medical discourses, at least at the level of the World Health Organization (WHO), have not been static in their conceptions of bodily functioning and disability. This is reflected in the way in which the WHO's classification of the outcomes of health conditions has changed in the last three and a half decades. The International Classification of Impairments, Disabilities and Handicaps (ICIDH),¹⁴³ adopted in 1980, characterised the "consequences of diseases" as follows:¹⁴⁴ A disease caused impairment, which was defined as a loss or abnormality of bodily structures and functioning. Impairment would then cause disability, which was defined as a lack of ability to perform a normal activity. A disability could manifest as a handicap, which was regarded as a limitation in fulfilling a role in life.

A major criticism of the ICIDH was that the three-tiered, linear causal model described above did not incorporate environmental factors and, furthermore, that it used negative terminology.¹⁴⁵ Disability activists objected that disability was individualised and medicalised without any reference to its social, economic or political context. Partly in response to these criticisms and after a fairly long revision process, all 191 member states of the WHO adopted the International Classification of Functioning, Disability and Health (the ICF) in 2001.¹⁴⁶

The laudable aims of the ICF are:

- “• to provide a scientific basis for understanding and studying health and health-related states, outcomes and determinants;
- to establish a common language for describing health and health-related states in order to improve communication between different

¹⁴³ WHO. *International Classification of Impairments, Disabilities and Handicaps: A Manual of Classification Relating to the Consequences of Disease*. (1980)

http://whqlibdoc.who.int/publications/1980/9241541261_eng.pdf (Accessed: 6 February 2015).

¹⁴⁴ H Hemmingsson and H Jonsson. "An Occupational Perspective on the Concept of Participation in the International Classification of Functioning, Disability and Health – Some Critical Remarks." (2005) 59(5) *American Journal of Occupational Therapy* 570.

¹⁴⁵ G Stucki, A Cieza and J Melvin. "The International Classification of Functioning, Disability and Health: A Unifying Model for the Conceptual Description of the Rehabilitation Strategy." (2007) 39(4) *Journal of Rehabilitation Medicine* 39; Hemmingsson and Jonsson 570; Imrie 290.

¹⁴⁶ WHO. *International Classification of Functioning, Disability and Health*. (2001) http://siqua.istat.it/SIQual/files/ICF_18.pdf?cod=434&tipo=11 (Accessed: 6 February 2015) (hereinafter referred to as "WHO 'ICF'").

users, such as health care workers, researchers, policy-makers and the public, including people with disabilities;

- to permit comparison of data across countries, health care disciplines, services and time;
- to provide a systematic coding scheme for health information systems.”¹⁴⁷

Unlike the ICIDH, the ICF “seeks to locate an understanding of disability at the intersection between the biological body and the social and institutional structures.”¹⁴⁸ It is schematically represented in Figure 1 below.

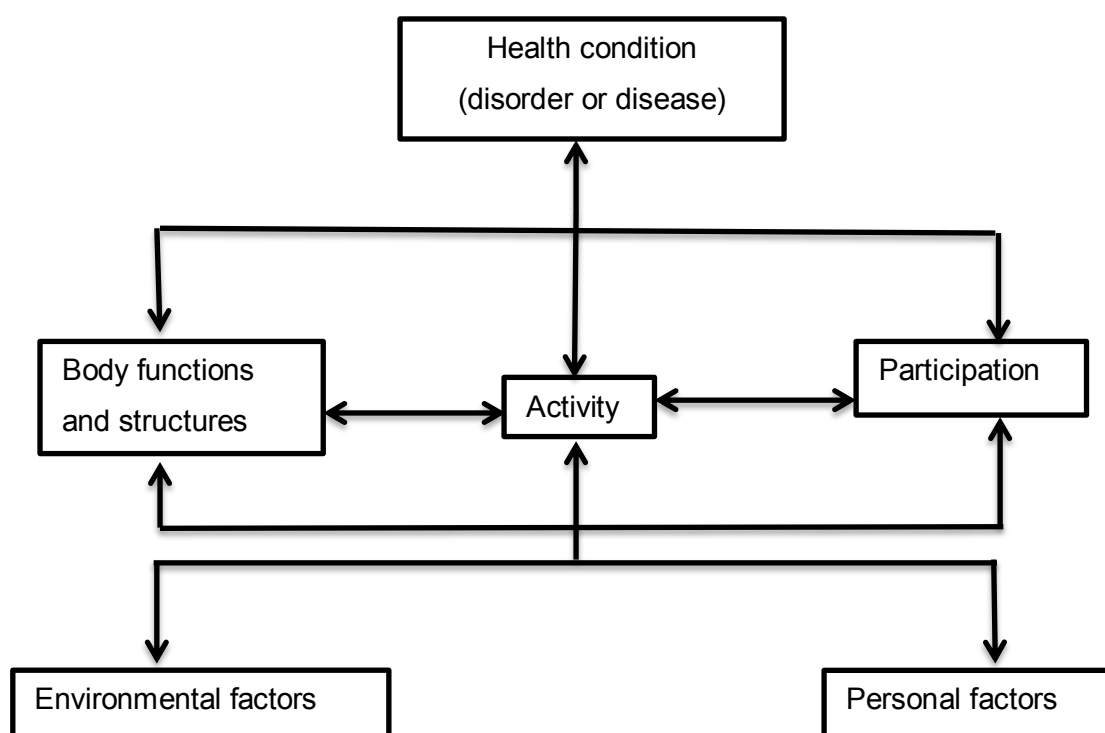


Figure 1: Interactions between the components of the ICF¹⁴⁹

Imrie summarises the basic scheme of the ICF succinctly:

¹⁴⁷ WHO 'ICF' 5.

¹⁴⁸ Hemmingsson and Jonsson 570.

¹⁴⁹ WHO. "The ICF Model: Interaction between ICF Components." (2001) cited in WHO. *How to Use the ICF: A Practical Manual for Using the International Classification of Functioning, Disability and Health (ICF)*. (2013) <http://www.who.int/classifications/drafticfpracticalmanual.pdf> (Accessed: 6 February 2015) 5.

“The ICF’s classification covers any disturbance in terms of functional states associated with health conditions at body, individual and society levels. Functional states include body functions and structures, activities at the individual level and participation in society. As the ICF suggests, disability is the variation of human functioning caused by one or a combination of the following: the loss or abnormality of a body part (i.e. impairment); difficulties an individual may have in executing activities (i.e. activity limitations); and/or problems an individual may experience in involvement in life situations (i.e. participation restrictions). [...] ‘[T]he three dimensions are co-equals in significance and ... are different facets ... of a single emergent phenomenon, disablement’. The ICF also notes that variations in human functioning (i.e. disability) are influenced by contextual factors, including environmental factors or aspects of the external or extrinsic world such as social systems and services, and personal factors, such as age, ethnicity, gender, social status, etc.”¹⁵⁰

While the ICF is clearly an attempt to steer a middle ground between the extremes of individual models on the one hand, and wholly social models on the other, commentators have recognised that further conceptual clarifications and developments are necessary in order for the ICF to be applied in a consistent manner that does not continue to exclude the voices of disabled people. Some of these grey areas will pose challenges in the individualised, concrete situations in which decisions have to be made about whether to employ someone, as well as when courts or tribunals have to decide whether unfair discrimination or other unfair conduct has been perpetrated against disabled persons.

As will be discussed in Chapters 4 and 5, the stage of the legal or policy processes at which medical or social perspectives dominate is of cardinal importance. If medical conceptions determine eligibility for protection from discrimination, these conceptions feed into the subsequent inquiries as to the fairness of the impugned

¹⁵⁰ Imrie 292-293.

conduct in various ways.¹⁵¹ Similarly, if policies situate the ‘problem of disability’ within disabled individuals, the impetus for the imposition and enforcement of positive obligations on employers and other social actors is diluted, even if social understandings of disability enjoy rhetorical prominence.¹⁵²

2.3.1.2 Conceptualisation of impairment

The ICF regards impairment as an objectively determinable fact. It does recognise the interaction of the impaired body with social and institutional factors that change the meaning and consequences of that impairment, but the impairment itself is regarded as “‘pre-social’, biological, bodily difference.”¹⁵³

Many disability scholars take issue with such interactionist perspectives that do not recognise the social dimensions of impairment. Paul Abberley argues that for disabled people, “the body is the site of oppression, both in form, and in what is done with it.”¹⁵⁴ In his view, a failure to recognise that impairment is a social product intrinsically linked to capitalism inevitably leads to merely descriptive accounts that implicitly justify an oppressive social order.¹⁵⁵

In contrast to Abberley, Priestley is of the view that such approaches are not inherently oppressive, but concedes that they have produced an undue amount of oppressive research because bio-medical paradigms have been used to investigate social problems.¹⁵⁶ An example of this phenomenon in which bio-medical paradigms are used to investigate social problems may be where research on depression emphasises individuals’ neurological deficits to the exclusion of social and environmental factors that may have negative influences on the individuals concerned.

¹⁵¹ See 4.3.3.

¹⁵² See 5.5.1.

¹⁵³ Imrie 294.

¹⁵⁴ Abberley ‘Concept of Oppression’ 14.

¹⁵⁵ Ibid.

¹⁵⁶ M Priestley. “Constructions and Creations: Idealism, Materialism and Disability Theory.” (1998) 13(1) *Disability and Society* 75 (hereinafter referred to as “Priestley ‘Constructions’”) 79.

Imrie also recognises that treating impairment as biologically and objectively measurable has the potential to measure disabled people's bodies against what is 'natural' or 'normal' and may be used to confer unequal treatment.¹⁵⁷ However, he does not see this as an inevitable consequence and proposes that the ICF is more explicit about what he terms its "realist" perspective of impairment, which is that people's relationships with their own physical bodies precedes their relationship with others and their environments.¹⁵⁸

As will be discussed in Chapter 4¹⁵⁹, the construction of the relationship between impairment and disability is important in respect of access to work. The binary created by the traditional social model is clearly not helpful, as a consideration of whether a person is able to perform the essential functions of a job necessarily has to engage individual impairment. If impairment is determined in terms of biomedical approaches that do not take cognisance of social factors that impact this determination, disabled persons may be unnecessarily excluded. We therefore have to examine evidentiary approaches closely, as will be discussed in Chapter 5.¹⁶⁰

2.3.1.3 Development of biopsychosocial perspectives beyond vague recognition of the integration of biological, social and environmental components

No theoretical justifications are given for the biopsychosocial (BPS) framework espoused by the ICF, or its theoretical origins.¹⁶¹ Some commentators have argued that BPS theory is essentially a biological paradigm within social parameters and that it favours biomedical sciences over the social sciences. Imrie expresses concern about the adequacy of BPS's conception of social structures and processes.

¹⁵⁷ Imrie 295.

¹⁵⁸ Ibid.

¹⁵⁹ See 4.4.4.1.

¹⁶⁰ See 5.4.5.

¹⁶¹ Imrie 296.

This concern is partly borne out by Hemmingsson's and Jonsson's three central objections to the manner in which the ICF operationalises people's participation in society. Firstly, these authors argue that in terms of the ICF, the only way in which to assess whether a person does participate is through observation by a third party; the person's "subjective experience of meaning" is ignored.¹⁶² This mode of operation is in direct opposition to the trend in occupational therapy in the last two decades to focus less on performance components and more on what people subjectively experience in daily life.¹⁶³

Hemmingsson's and Jonsson's second criticism is that the ICF definition of participation does not emphasise how people feel about their "opportunities to influence their daily lives and make decisions about personal questions", in other words their autonomy.¹⁶⁴ They argue that the objective components of autonomy, such as social structures, are catered for in the inclusion of environmental factors, but that once again, people's subjective experiences are overlooked.¹⁶⁵

This aspect of whose perspectives are taken into account in determining the nature and extent of impairment, if any, may be important in determining whether employing a person with an impairment constitutes an unacceptable risk, an issue that came to the fore in the *IMATU* case, which will be discussed in Chapter 5.¹⁶⁶ Similarly, we have to examine whether, when, and how disabled persons' perspectives on their experiences of impairment are considered in decisions regarding reasonable accommodation, as became apparent in the *Lucas* case.¹⁶⁷

Hemmingsson's and Jonsson's third concern with the ICF's operationalisation of participation is what they term its "one-dimensional view on environmental factors as either facilitators or barriers for participation that in turn will decrease or increase the

¹⁶² Hemmingsson and Jonsson 572.

¹⁶³ Ibid.

¹⁶⁴ Hemmingsson and Jonsson 573.

¹⁶⁵ Ibid.

¹⁶⁶ See 5.4.5.

¹⁶⁷ See 5.4.6.

person's participation in a certain life situation.”¹⁶⁸ They warn that one life situation may involve different kinds of participation that are related in a complex way: An example is that a single environmental factor could simultaneously be a facilitator and a barrier for the same person, such as when a school assistant facilitates academic participation but hinders social participation.¹⁶⁹ This complexity has to be taken into account when guidelines for employers are issued, as well as when employers decide on positive measures that will remove barriers to participation, in consultation with disabled persons and professionals who are called upon to assist.

To summarise, therefore, the environmental or relative conception of disability, as embodied in the WHO's ICF, seems to have gained influence in recent years, as it is regarded as a middle ground between the individual and social models of disability, respectively. However, some conceptual gaps remain and will impact on how the lived experiences of disabled people are reflected in efforts to create substantive equality for disabled persons, including in respect of their access to work.

2.3.2 A suggested theoretical typology of conceptions of disability

In the previous section, we discussed the need to go beyond mere recognition of the interaction of vaguely formulated biological, social and environmental components. As shown in Tables II and III on page 48, Priestley posits that the juxtaposition of 'individual' and 'social' perspectives needs to be supplemented by another dichotomy that is interrelated to the first, namely the “divergence between materialist and idealist levels of explanation.” Materialist perspectives emphasise “the primacy of political economy in shaping culture while idealist [...] analyses suggest the converse.”¹⁷⁰

¹⁶⁸ Ibid.

¹⁶⁹ Hemmingsson and Jonsson 573-574.

¹⁷⁰ Priestley 'Constructions' 76. K Marx. A Criticism of the Hegelian Philosophy of Right. In: K Marx. *Selected Essays* (translated by HJ Stenning). (1926) 8-9 encapsulates the materialist perspective when he writes:

“He who has only found a reflexion of himself in the fantastic reality of heaven where he looked for a superman, will no longer be willing to find only the semblance of himself, only the sub-human, where he seeks and ought to find his own reality.

Priestley suggests that as a result of the above interactions, it is possible to consider approaches to social theory in general in two dimensions, as represented in Table II on page 48.¹⁷¹ Positions 1 and 2 focus on individuals and flow from the nominalist premise that social phenomena have no existence beyond how we perceive and interpret them.¹⁷² Positions 3 and 4 are more concerned with the collective and start from the premise that social phenomena have a 'real' existence beyond how we perceive and interpret them.¹⁷³

Position 1 places a high premium on knowledge gained from the observation and classification of bodies, while Position 2 values "knowledge derived from the experiences, beliefs and interpretations of individual actors."¹⁷⁴ Position 3 is concerned with how 'real' social structures (beyond people's experiences), such as capitalism, patriarchy or imperialism, determine social relations.¹⁷⁵ Position 4 is also realist in orientation, but proceeds from the idea that "social reality exists more in ideas than in material relations of power."¹⁷⁶

Priestley then posits that the above typology, which is deliberately simplified and contains some gross generalisations, can be applied to disability theory too.¹⁷⁷ Position 1 reflects what we know as 'the medical model' and essentially considers impairment as biologically determined.¹⁷⁸ Position 2 is also an individual model, but instead of focusing on biology and the impaired body, its central concerns are how

The foundation of the criticism of religion is: Man makes religion, religion does not make man. Religion indeed is man's self-consciousness and self-estimation while he has not found his feet in the universe. But Man is no abstract being, squatting outside the world. Man is the world of men, the State, society. This State, this society produces religion, which is an inverted world consciousness, because they are an inverted world."

¹⁷¹ Priestley 'Constructions' 76.

¹⁷² Ibid. G Burrell and G Morgan. *Sociological Paradigms and Organizational Analysis: Elements of the Sociology of Corporate Life*. (1979) 5 explain the essence of nominalism thus:

"The nominalist position revolves around the assumption that the social world external to individual cognition is made up of nothing more than names, concepts and labels which are used to structure reality. The nominalist does not admit to there being any 'real' structure to the world which these concepts are used to describe. The 'names' used are regarded as artificial creations whose utility is based upon their convenience as tools for describing, making sense of and negotiating the external world."

¹⁷³ Priestley 'Constructions' 76-77.

¹⁷⁴ Priestley 'Constructions' 77.

¹⁷⁵ Priestley 'Constructions' 78.

¹⁷⁶ Ibid.

¹⁷⁷ Priestley 'Constructions' 79.

¹⁷⁸ Ibid.

personal experience and the negotiation of social roles between individuals produce disability.¹⁷⁹ Examples include interpretive psychological analyses of how people ‘adjust’ to impairment and the attitudes of non-disabled people towards people with impairments.¹⁸⁰

Position 3 is a social model that gained prominence in the work of writers such as Oliver, Finkelstein and Barnes. It focuses on disability as material relations of power arising within a specific historical context.¹⁸¹ Analyses point to physical, structural or institutional barriers that disable and a central premise is that disabled people are disadvantaged not by impaired bodies and minds, but by society.¹⁸²

Position 4 is also a social model, but its starting point is that disability is an “idealist product of a society developing within a specific cultural context.”¹⁸³ Within this view, atypical bodies exist in all societies, but social responses to such difference will vary according to predominant cultural perceptions and interpretations.¹⁸⁴

The four approaches set out by Priestley are not mutually exclusive and many disability scholars frequently combine perspectives,¹⁸⁵ but his typology is helpful if we have to analyse which conceptions of disability are favoured by laws and policies.

¹⁷⁹ Priestley ‘Constructions’ 80.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Priestley ‘Constructions’ 81.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Priestley ‘Constructions’ 82.

Table II: Four paradigms for the study of social phenomena (Priestley ‘Constructions’ 77)

	Materialist	Idealist
Nominalist	Position 1 <ul style="list-style-type: none"> • Subjective materialism • Social phenomena have no real existence beyond material individuals • Social phenomena may be shaped by biology • Variate empiricism & biological determinism 	Position 2 <ul style="list-style-type: none"> • Subjective idealism • Social phenomena have no real existence beyond the experience of voluntaristic individuals • Social phenomena may be shaped by attitudes & beliefs • Symbolic interactionism, phenomenology & interpretative paradigms, feminist psychologies
Realist	Position 3 <ul style="list-style-type: none"> • Objective materialism • Material society exists beyond the individual • Social phenomena may be shaped by political economy, structural patriarchy etc. • Historical materialism, structural feminism, social creationism & Marxist analyses 	Position 4 <ul style="list-style-type: none"> • Objective idealism • Idealist society exists beyond the individual • Social phenomena may be shaped by social values, culture etc. • Positivist sociology, social constructionism & cultural relativism

Table III: Four approaches to disability theory (Priestley ‘Constructions’ 78)

	Materialist	Idealist
Individual	Position 1 <ul style="list-style-type: none"> • Individual materialist models • Disability is the physical product of biology acting upon the functioning of material individuals (bodies) • Units of analysis are impaired bodies 	Position 2 <ul style="list-style-type: none"> • Individual idealist models • Disability is the product of voluntaristic individuals (disabled & non-disabled) engaged in the creation of identities & the negotiation of roles • Units of analysis are beliefs & identities
Social	Position 3 <ul style="list-style-type: none"> • Social creationist models • Disability is the material product of socio-economic relations developing within a specific historical context • Units of analysis are disabling barriers & material relations of power 	Position 4 <ul style="list-style-type: none"> • Social constructionist models • Disability is the idealist production of societal development within specific cultural context • Units of analysis are cultural values & representations

2.3.3 Themes that flow from social explanations of disability

From the above discussions, we can extract themes that can be used to analyse if and how laws and policies incorporate social explanations of disability. These themes will be introduced here briefly and then expanded upon in the context of the relevant equality, labour and social security laws in subsequent chapters.

2.3.3.1 The causes of disability

An important component of the examination of the extent to which social understandings have been incorporated into laws and the enforcement of laws is the implicit and explicit assumptions made about the causes of disability. Specific issues that may be of import include when the causes of disability are regarded as relevant, if at all; the respective weightings attached to social and individual causes and when these predominate; the conceptualisation of impairment; and, if social causes are recognised, whether the emphasis is on idealist or material causes.

2.3.3.2 The conceptualisation of disadvantage

Samaha offers an illuminating explanation of the difficulties inherent in any model or explanation that operates at a macro level.¹⁸⁶ He argues that proponents of the social model of disability do not articulate the kind of disadvantage or disability they have in mind. Does the disadvantage have to be absolute or relational? If it is absolute, it means that some minimum standard has to be developed using independent benchmarks. If a relational standard is adopted, who is the comparator group? Would it be able-bodied people, other disabled people with a different type of disability or other disabled people with the same type of disability? Also, how severe does the disadvantage have to be before it deserves attention and which dimensions of disadvantage are similarly worthy of attention? These challenges are

¹⁸⁶ See AM Samaha. "What Good is the Social Model of Disability?" (2007) 74 *University of Chicago Law Review* 1251 at 1264-1265.

not limited to social understandings of disability, but inhere in the conceptualisation of equality more generally, as will be discussed below.¹⁸⁷

2.3.3.3 Potential empirical inaccuracy

The central claim of social understandings of disability is that the interaction of personal traits and social barriers causes disability. This is not meant to be an empirical statement and it is not known how often social barriers or personal traits are primarily responsible for disability.¹⁸⁸ It is also not known how causation varies with changes in variables such as income level, geographical location, geopolitical circumstances, state of development and culture. This information is required for social planning purposes and is also needed when non-discrimination claims are brought before courts and tribunals.

2.3.3.4 Implications of social explanations for institutional design and dispute resolution

Social understandings may or may not contribute to the normative choices that influence whether individualised solutions are proposed or whether the social and physical environment has to change. Samaha illustrates the differences in expertise that may be required if social, as opposed to individualised, responses have to be implemented in response to deafness:¹⁸⁹

“While economic cost considerations might call for a similar set of accounting skills, and medical knowledge is surely relevant to nearly any public policy involving physical and mental traits, social and environmental reengineering depend on additional skills if the policy mission is to be successful. If government will subsidize cochlear implants or genetic screening, doctors and medical technicians along with economists will be useful. But if government

¹⁸⁷ See 3.4.

¹⁸⁸ Samaha 1263.

¹⁸⁹ See Samaha 1307.

intends to manufacture social settings in which deafness and other impairments are not socially disadvantageous, the policymakers and executors ought to be a more diverse group if not simply different. Now sociologists, architects, political scientists, social psychologists, anthropologists, historians, and others with unique skill sets become more valuable. Understanding disadvantageous environments, whether built or the product of social interaction, can be a matter of uncommon knowledge. Physicians, however, might be the last people asked for their opinion.”

It follows, therefore, that the recognition of social causes of a disability may lead to different policy responses, which in turn will require different expertise to implement than if biomedical perspectives and responses were the focus. At a micro-level, this may influence the professionals employers will hire to assist in the conception and implementation of reasonable accommodation measures.

2.4 Objectives of labour and social security law and relevance of disability

Now that we have considered the possible implications of social explanations of disability at a fairly abstract level, it would be useful to ask why we want to know who is disabled for purposes of labour and social security law. Before we can engage with this question in any great depth, though, it may be useful to consider the overall purposes or objectives of labour and social security law as these relate to disabled people. Some may argue that labour law and social security law regulate different spheres of human endeavour, but it is the intersections of these two fields of law that will be the focus of this thesis. The phrase ‘labour and social security law’ is thus used, unless the context requires a separation.

D’Antona argues that labour law, starting at the end of the 20th century, has experienced an identity crisis, the general features of which he explains thus:

“Labour law’s identity crisis is tied to a transformation of its object, that is, labour, or at least the labour with which labour law was traditionally

concerned: the status of 'employee' [...] which, as everyone knows, does not now include, and never has included, all the labour that moves the mechanisms of the economy and gives form and life to the institutions of society. So, the labour with which labour law has until now been concerned seems to be found less and less, [...] and, where it is found, exhibits characteristics not readily reconciled with the traditional model. The debate over job security starts here, as does the eventual revision of the normative criteria to identify 'employment'.”¹⁹⁰

The recognition that labour law needs to change with regard to whom it protects and how it goes about doing so has meant that it still performs its traditional functions of ensuring freedom of association, collective bargaining and the elimination of discrimination in respect of employment and occupation.¹⁹¹ However, there are increased calls for an expansion of its social function to protect workers outside the traditional employment relation,¹⁹² for it to regulate the labour market rather than just the employment relationship¹⁹³ and for it to take an active role in enhancing the capabilities of individuals.¹⁹⁴

Labour law and social security law intersect in various ways. For most people, wage labour is the primary means through which to attain social security. Employment-based social insurance to cover risks such as unemployment and occupational injuries and diseases forms part of the social security system and is administered by the Department of Labour. In some instances, inability to work or a lack of available employment is an eligibility requirement to qualify for social assistance.

Labour and social security law affects disabled people in various ways, some of which are listed next:

¹⁹⁰ M D'Antona. Labour Law at the Century's End: An Identity Crisis? In: J Conaghan, RM Fischl and K Klare (eds). *Labour Law in an Era of Globalization*. (2000) 32.

¹⁹¹ See ILO. "Declaration on Fundamental Principles and Rights at Work." www.ilo.org/declaration/thedeclaration/lang--en/index.htm (Accessed: 6 February 2015).

¹⁹² T Teklè. Labour Law and Worker Protection in the South: An Evolving Tension between Models and Reality. In: T Teklè (ed). *Labour Law and Worker Protection in Developing Countries*. (2010) 5.

¹⁹³ Ibid.

¹⁹⁴ Teklè 6.

- (i) Disabled people may seek to enter or maintain employment, so labour law is implicated in that it provides protection against unfair discrimination in recruitment and selection processes and once people are employed;
- (ii) Labour law may also have work creation components that could benefit disabled people;
- (iii) People may sustain occupational injuries or contract occupational diseases that may render them unable to work, so they may require social insurance benefits. Some people will also have private insurance to protect them against such risks. They may need protection against unfair dismissal. They may also need to be reintegrated once they are able to return to work; and
- (iv) People may develop impairments due to non-work causes. They may have to be protected against unfair discrimination or unfair dismissal.

As alluded to in Chapter 1,¹⁹⁵ this thesis will focus on non-discrimination laws, as well as government's positive obligations to facilitate access to work. It is therefore the protection against discrimination ((iv) above), as well as the work creation measures at the intersection of labour and social security law ((ii) above) that will be the focus here. The general aims and objectives of social security and how it implicates access to work are discussed in Chapter 6.¹⁹⁶

Positive measures exist at various levels of operation. Policies are made, after which framework legislation is enacted to give effect to these policies. Codes of Good Practice or other guidelines may be created to assist in implementation. Certain litigation mechanisms and processes may favour certain conceptions of disability. All these policies and laws, as well as these processes, have to comply with the Constitution. Strategies to challenge non-compliance may focus on policy processes before legislation is passed, seek remedies to change legislation after it is passed, challenge the implementation of legislation or policies or a combination of these.

¹⁹⁵ See 1.1.

¹⁹⁶ See 6.2.3.

2.5 Broad analytical framework

This chapter undertook a broad overview of some of the historical circumstances and events that have influenced conceptions of disability, many of which persist to this day. The economic, social and political contingency of responses to atypical physical, intellectual and psychosocial characteristics are apparent. It is also clear that the organisation of work has been instrumental in disabled persons' exclusion from economic, as well as political and social processes.

One of the striking historical features is the interrelationship of poverty and disability. Initially no distinction was drawn between poor people and disabled people. However, as labour shortages emerged, the category of disability was employed to distinguish 'deserving' poor persons from those deemed undeserving. The category therefore has social, economic and political significance.

Disability movements have struggled for recognition, but have made significant gains, one of which is the increasing recognition of the social contingency of disability. In order to assess if and how these social understandings of disability are incorporated into selected equality, labour and social security laws that seek to promote access to work for disabled persons, the themes that flow from social understandings of disability, as discussed in 2.3, will be used to analyse the selected legal frameworks for non-discrimination and work creation in Chapters 4, 5 and 6. A schematic representation of this process appears in Figure 2 on the next page.

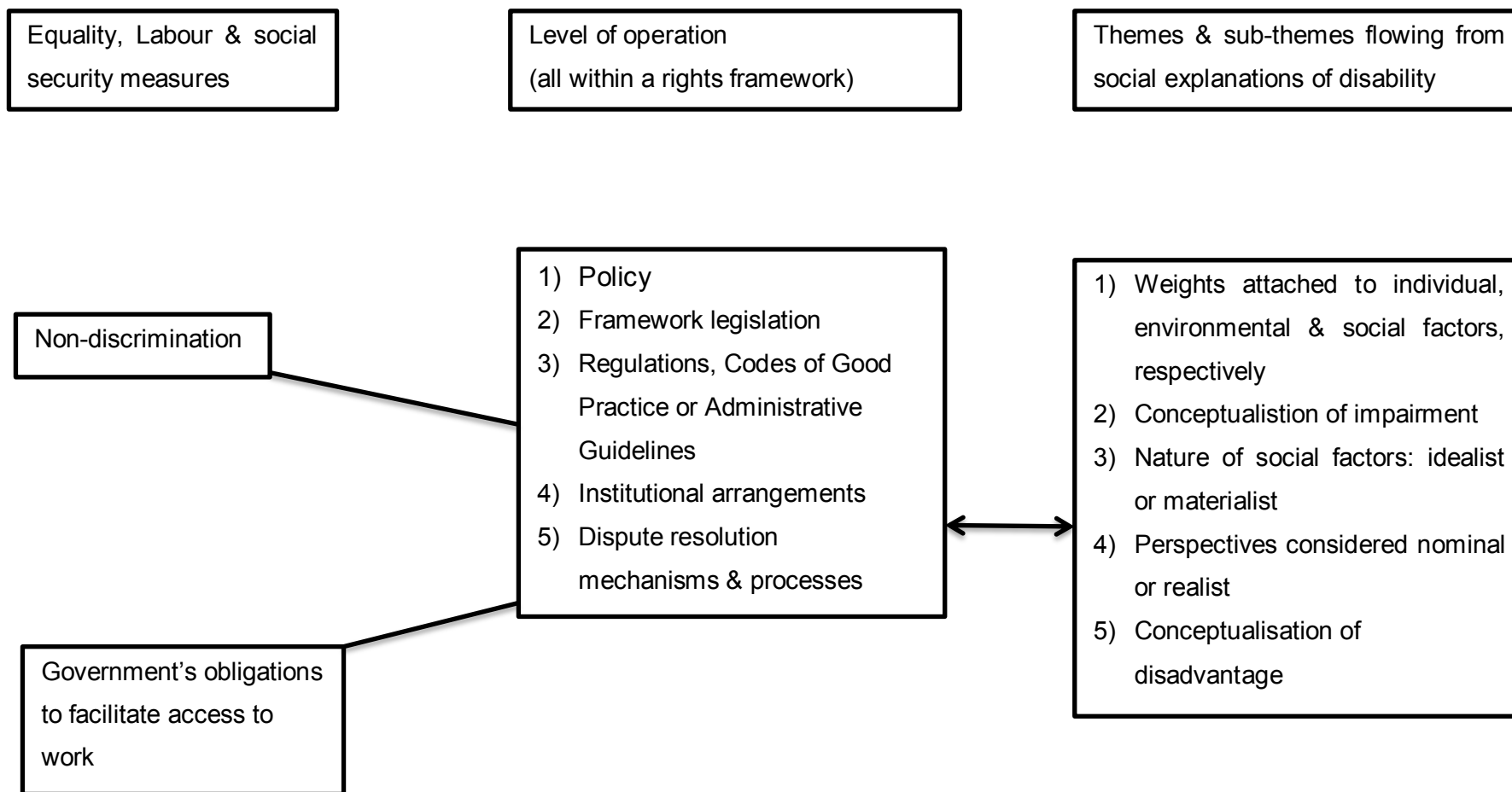


Figure 2: Broad analytical framework to be used in the analysis of how social explanations of disability are incorporated within anti-discrimination and work creation measures

CHAPTER 3: SUBSTANTIVE EQUALITY AND CONCEPTIONS OF DISABILITY

3.1 Introduction

In the previous chapter, we explored the types of questions social understandings of disability require us to ask in our assessment of if and how equality, labour and social security laws incorporate the social dimensions of disability. In this chapter, we examine substantive equality and how the debates discussed in the previous chapter offer opportunities to examine notions of substantive equality for disabled people in the context of access to work.

This chapter has four broad objectives: The first objective is to examine what substantive equality requires in general terms. The second is to analyse how it has been articulated and applied in constitutional and labour jurisprudence. The third objective is to consider synergies and areas of friction between social understandings of disability and notions of substantive equality as articulated and applied by South African courts. Finally, the aim is to identify issues relating to substantive equality that may be of importance in the formulation of positive duties on employers and the state to promote access to work for disabled persons.

The constitutional right to equality is considered here for various reasons. The Constitution requires that all law and conduct comply with its provisions.¹⁹⁷ Later analyses of reasonable accommodation duties have to bear in mind possibilities and constraints that flow from constitutional supremacy. The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.¹⁹⁸ It

¹⁹⁷ Section 2 states: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” Section 172(1)(a) provides: “When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.

¹⁹⁸ Section 8(1) of the Constitution. “Organ of state” is defined in s239 of the Constitution as “(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution –

also applies to non-state actors to the extent that it is applicable, bearing in mind the nature of the right and the nature of the obligation imposed by the right.¹⁹⁹

The current chapter is limited to the rights framework. It is recognised that structural and institutional limitations on power, which are provided for in the Constitution, affect people with disabilities. So, for example, provisions relating to who may initiate and pass laws and how such laws must be passed, the scope of the courts' authority to check legislative and executive power, the roles and obligations of the various levels of government within a system of cooperative government or the financial provisions within the Constitution may all have a profound impact on people's lives.²⁰⁰ However, limitations of time and space make a narrowed focus inevitable.

There are various reasons for the rights focus. Firstly, the links between social understandings of disability and rights are generally recognised,²⁰¹ but there is room for explorations into the nature of such links and how to optimise these links.²⁰²

(i) exercising a power or performing a function in terms of the Constitution or a provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer", unless the context indicates otherwise.

¹⁹⁹ Section 8(2) of the Constitution.

²⁰⁰ See, for example, CE Draper, C Lund, S Kleintjes, M Funk, M Omar, AJ Flisher and the Mental Health and Poverty Project Research Programme Consortium. "Mental Health Policy in South Africa: Development Process and Content." (2009) 24(5) *Health Policy and Planning* 342 at 350-351 for a discussion of how mental health policy dissemination and implementation have been adversely affected by, inter alia, a lack of coordination between national and provincial levels of government and the lack of priority given to mental health within the provinces.

²⁰¹ The INDS (in its Executive Summary and in its situation analysis in Chapter 1) recognises the social model of disability as a consequence of viewing disability as a human rights issue. It is arguable whether social understandings of disability have led to increased emphasis on the human rights of disabled people or whether there is a mutually supporting relationship rather than a unidirectional causal connection. However, the links between social understandings of disability and rights discourse are apparent, even though the nature of these links may be more contentious. See, inter alia, MA Stein. "Disability Human Rights" (2007) 95(1) *California Law Review* 75 (hereinafter referred to as "Stein 'Human Rights'"); Samaha 1251 and Kanter 403. See 1.5 in Chapter 1 for Kanter's description of the connection between law and disability studies more generally.

²⁰² Some commentators, for example, distinguish between the social model of disability and what can loosely be termed a human rights model of disability – see, for example, Michigan Disability Rights Coalition. "Models of Disability." (no date) www.mymdrc.org/models-of-disability.html (Accessed: 6 February 2015). See, also, T Shakespeare. Disability, Identity and Difference. In: C Barnes and G Mercer (eds). *Exploring the Divide: Illness and Disability*. (1996) 94 at 97, who notes that a minority group approach of disability [which a human rights model would emphasise] "is a weaker claim than the social model, focusing on power politics and identity politics, while not necessarily problematising disability itself." These tensions are addressed in this work, but not necessarily within the rubric of differences between models of disability.

Secondly, South Africa has ratified the CRPD,²⁰³ which requires that states review their laws, policies and practices for compliance with its provisions. Although South Africa's international-law obligations are not the primary focus in this thesis, the Constitution mandates an international-law friendly approach to the interpretation of the rights in the Bill of Rights and legislation.²⁰⁴ It is therefore imperative that the implications of the CRPD for South African law and policy be considered where relevant to the issues at hand.

This chapter is structured as follows: Part 2 briefly considers commonalities and tensions between social understandings of disability on the one hand and rights discourse on the other. The third section then examines what is meant by a substantive approach to equality in the context of disability. Part 4 considers possible conceptual synergies and points of friction between capabilities, disability and substantive equality. Part 5 contains a critical analysis of employment equity laws, with a particular focus on the definitions of disability used to determine the protected class.

3.2 Social understandings of disability and rights

Social understandings of disability require radical changes to the ways in which society functions so that disabled people are able to live autonomous lives and are included, on an equal basis with enabled persons, in the lives of their communities. Rights have the potential to contribute to this process of change, but also bear characteristics that may inhibit or prevent the changes sought by disability movements. This section examines some aspects of the interrelationship between social understandings of disability and rights discourse.

²⁰³ See UN. "Convention on the Rights of Persons with Disabilities." (2006) <http://www.un.org/disabilities/convention/conventionfull.shtml> (Accessed: 6 February 2015) for the CRPD and UN. "Optional Protocol to the Convention on the Rights of Persons with Disabilities." (no date) <http://www.un.org/disabilities/default.asp?id=311> (Accessed: 6 February 2015) for its optional protocol.

²⁰⁴ The Constitution mandates that when interpreting the Bill of Rights, interpreters "must consider international law" and "may consider foreign law" (ss 39(1)(b) and (c)). Section 233 also states that when interpreting legislation, courts "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

3.2.1 Complementary aspects of the interrelationship between social understandings of disability and rights

There are various reasons why social understandings of disability and rights discourse would be complementary, most of which flow from their communitarian ethos. Firstly, asserting rights implies a community and challenges that community to balance the interests of individuals, groups and the state.²⁰⁵ Social understandings similarly require a focus on how society disables people. Secondly, rights consciousness is not limited to awareness of rights that have been granted in the past, but also provides a discourse within which to persuade others to recognise new rights.²⁰⁶ Social understandings compel the identification of environmental and social barriers that impede disabled people, which may provide material with which to persuade communities and powerful actors to recognise rights in ways that impact positively on the lives of disabled people.

Given these general similarities, it is not surprising that rights discourse and social understandings have been subject to similar critiques. Rights detractors argue that rights are indeterminate, given the general terms in which these are articulated.²⁰⁷ This argument is similar to the concerns that social understandings of disability are framed in the abstract and that they do not provide much insight into *how* society has to change.

A second critique advanced by scholars within the Critical Legal Studies movement is that rights are internally incoherent because they protect contradictory interests, for example “freedom” and “security”.²⁰⁸ These contradictions, so the argument goes, lead to mystification and manipulation, which may alienate those who do not have the tools or resources to engage in rhetorical and legal battles. Likewise, concerns have been raised that some social understandings of disability do not reflect the reality of all disabled people’s lives and that an over-emphasis on

²⁰⁵ M Minow. “Interpreting Rights: An Essay for Robert Cover.” (1987) 96(8) *Yale Law Journal* 1860 (hereinafter referred to as “Minow ‘Interpreting Rights’”) at 1867; J Nedelsky. “Reconceiving Rights and Constitutionalism.” (2008) 7(2) *Journal of Human Rights* 139.

²⁰⁶ See Minow ‘Interpreting Rights’ at 1867.

²⁰⁷ P Christie. “The Complexity of Human Rights in Global Times: The Case of the Right to Education in South Africa.” (2010) 30(1) *International Journal of Educational Development* 3.

²⁰⁸ See Minow ‘Interpreting Rights’ at 1864.

environmental and social barriers drowns out people's lived experiences of bodily impairment, as well as the limitations in functioning caused by such impairment.²⁰⁹

For all the general consistencies between and complementary characteristics of social understandings of disability and rights discourse, several aspects of the relationship between social understandings and rights require consideration. At the heart of this inquiry is the interrelationship between the personal characteristics of the disabled person and his or her physical, social and cultural environment. In the previous chapter, we examined how disability scholars have theorised this aspect of this interrelationship.²¹⁰ Some rights scholars have also examined the balance between the individual and social dimensions in our conception of rights. These authors posit that all rights, whether classified as civil, political or social, have "an atomistic dimension that seeks to erect barriers between individuals and society, and a social dimension that seeks to connect individuals and protect collective allegiances."²¹¹

The atomistic and social dimensions of rights have different starting points. The former assumes that individuals need to be protected from state power and that such individuals must have autonomy to make decisions based on their own values that are exempt from judgement.²¹² It emphasises individual preferences and the ability of individuals to advance their interests on their own; collective alliances are only recognised if these result from individual choice.²¹³ The emphasis is on individuals' separateness and differences, not the commonalities that are shared with others.²¹⁴

In contrast, the social dimension of rights is premised on individuals as constituted by their communities. It recognises that people's choices, or lack thereof, are influenced by the social circumstances within which they find themselves – by

²⁰⁹ See 2.3.1.1 and 4.4.4.1.

²¹⁰ See 2.3.1.

²¹¹ DM Davis, P Macklem and G Mundlak. Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment. In: J Conaghan, RM Fischl and K Klare (eds). *Labour Law in an Era of Globalization*. (2002) 511 at 521.

²¹² JM Woods. "Justiciable Social Rights as a Critique of the Liberal Paradigm." (2003) 38 *Texas International Law Journal* 763 at 767-768.

²¹³ Davis, Macklem and Mundlak 521.

²¹⁴ Woods 768.

“institutional structures, normative baselines, legal entitlements and social norms.”²¹⁵

What makes a community is itself a normative ideal in that it depends on the nature and extent of the human relationships recognised by members of that community.²¹⁶

The social dimension of rights therefore seeks to influence the nature of community, more specifically the creation of social supports that “maximize[] opportunities for individuals to construct and live a rich and interactive life.”²¹⁷

It is arguable that both the atomistic and social dimensions of rights are required to protect the individual’s separateness from, as well as his or her connection with, others.²¹⁸ Given that these dimensions are present in all rights, it is possible to advance people’s social wellbeing not only through the invocation and realisation of social rights, but also through an emphasis on the social dimensions of civil and political rights. Similarly, it is possible to interpret social rights in a manner that emphasises their atomistic dimensions. It is therefore important that we look at the dimensions of whatever rights are invoked, not merely their categorisation.

I will argue that the links between social understandings of disability and the recognition of the social dimensions of the rights to equality and social security are imperative if we are to move away from a conception of rights that always prizes individual autonomy through law over the construction of relationships that enable understanding between human beings. Young and Quibell argue that rights are unsuccessful at improving the social situation of people with intellectual disabilities because

“people still do not know how to treat others who are different; they are not aware of the variety of social institutions or practices necessary for particular ‘entitlements’, or even that such ‘entitlements’ are necessary. The irony is that

²¹⁵ Davis, Macklem and Mundlak 522.

²¹⁶ S Avineri and A de-Shalit. Introduction. In: S Avineri and A de-Shalit (eds). *Communitarianism and Individualism*. (1992) 6-7.

²¹⁷ Davis, Macklem and Mundlak 522. See, also, A Sen. “Response to Commentaries.” (2002) 37(2) *Studies in Comparative International Development* 78 who writes (at 79): “Human beings live and interact in societies, and are, in fact, societal creatures. It is not surprising that they cannot fully flourish without participating in political and social affairs, and without being effectively involved in joint decision making. But, in addition, I have tried to argue that our understanding of what our own needs are and what values and priorities we have reason to espouse may themselves depend on our interactions with others, and draw on the knowledge and discernment that can be generated only by open public discussion.”

²¹⁸ Davis, Macklem and Mundlak 522.

*it is the conception of human nature which the notion of 'rights' promulgates that reinforces this situation, where individual autonomy and the force of law takes precedence over the necessary ability of humans, as social animals, to understand each other" [emphasis in the original].*²¹⁹

My response to their critique will flow through this chapter and subsequent chapters. It acknowledges that rights discourse by itself will never be enough and may not always be the appropriate means through which to foster understanding between people. However, where rights are invoked, as they invariably will be, it is possible to formulate these in a way that aims to foster meaningful engagement between employers and employees, including work seekers, who are historically and currently marginalised. This focus on understanding has to be reflected in the contextual factors that animate our understanding of what substantive equality requires in concrete cases, in particular the content we give to positive duties on employers and government to promote access to work and the mechanisms we create to enforce such duties.

I will preface the discussion of equality and related rights with a few brief remarks about the general tensions between social understandings of disability and rights discourse. It is clear from the previous chapter that social understandings aim to improve our analyses and appreciation of the causes of disability,²²⁰ while rights are concerned with collective choices in our structuring of relationships of power and responsibility. Ideally, social understandings of disability should animate not only rights rhetoric, but the marrow or content of rights. If the central claim in social understandings of disability is that society and not disabled people should change, then a critical component of any right would have to be the duties it imposes on actors that could remove disabling barriers. As is foreshadowed above, some aspects of rights discourse pose challenges to its ability to serve disabled people and the creation of a more equitable society.

²¹⁹ DA Young and R Quibell. "Why Rights are Never Enough: Rights, Intellectual Disability and Understanding." (2000) 15(5) *Disability and Society* 747 at 758.

²²⁰ See 2.3.

3.2.2 Tensions between social understandings of disability and rights discourse

The parameters of this work do not allow for an extensive discussion of tensions between social understandings of disability and rights discourse, but these are central to how rights can affect the lived experiences of disabled people. These tensions are not limited to rights discourse and disability, but the scope of the study requires specification. Even the concept of disability is too broad, given the diversity of experiences that may fall under the umbrella of disability. Nevertheless, a few general concerns, which warrant further inquiry, will be mentioned below.

Firstly, rights discourse can be opaque, conceptually complex and access to it may be difficult or impossible for marginalised groups, including many people with disabilities. This inaccessibility is illustrated in the following quotation:

“People with the disabilities called intellectual disabilities, developmental disabilities, learning disabilities, and the like, some people with experiences causing them to identify as psychiatric survivors, even people with types of physical or chronic issues which cause fatigue — all of these people may benefit from not having to wade through walls of jargon in order to read about themselves. They would also benefit from not being expected to learn how to write in these ways in order for their voices to be heard.”²²¹

Given the positive correlation between disability and poverty,²²² other factors make rights discourse inaccessible or, some may argue, unattractive, to marginalised

²²¹ E. Grace. “Cognitively Accessible Language (Why We Should Care).” (2013) <http://thefeministwire.com/2013/11/cognitively-accessible-language-why-we-should-care/> (Accessed: 6 February 2015). Young and Quibell at 753 argue that “the failure of ‘rights’ to ensure justice for people with intellectual disabilities” occurs at various levels consistent with the longstanding critique that “the enforcement of these ‘rights’ requires a participatory involvement in abstract legal frameworks absent amongst the very groups that ‘rights’ are supposed to aid. In short, to empower oneself, one requires rights, but to exercise rights, one has to be in an empowered position.”

²²² See 1.1 fn 18. See, also, South Africa. *Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa (2002): Report No 9: Social Security for People with Disabilities*. <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/report9.php> (hereinafter referred to as “Taylor Committee Report No 9”) (Accessed: 6 February 2015), in which it is noted (at 358) that “[p]oor individuals make up a disproportionately large share of the disabled population.” The Committee cites two reasons for this phenomenon, namely that “poverty increases vulnerability to disability” and that “disability increases vulnerability to poverty”.

groups. One pertinent example is that many disabled work seekers may be prevented or dissuaded from challenging unfair discrimination by factors such as inaccessible transport systems, inequitable education, inaccessible and expensive legal processes and prejudiced attitudes.

The structural distances that may exist between human rights groups and disabled persons also inhibit the potential of rights as means through which to effect change. Odinkalu, in an article on why more Africans do not use human rights language, argues that people for whom human rights are a matter of life and death are aware of the injustices perpetrated against them and that a particular discourse alone will not advance their condition:

“What they need is a movement that channels these frustrations into articulate demands that evoke responses from the political process. This the human rights movement is unwilling or unable to provide. In consequence, the real life struggles for social justice are waged despite human rights groups – not by or because of them – by people who feel that their realities and aspirations are not adequately captured by human rights organizations or their language.”²²³

These ruptures between many human rights organisations and the most marginalised people are at odds with social understandings of disability, which are premised on the popular slogan within disability movements worldwide: ‘Nothing About Us Without Us’.²²⁴ The presence of some disabled people within human rights movements or within bureaucratic structures is important. However, that alone is not a guarantee of real difference in the lives of the most marginalised disabled people. Inequities in social and economic power require political participation *and* the formulation and implementation of redistribution policies.²²⁵

²²³ CA Odinkalu. “Why More Africans Don’t Use Human Rights Language.” (1999) http://www.carnegiecouncil.org/publications/archive/dialogue/2_01/articles/602.html (Accessed: 6 February 2015). According to him, a major consequence of this fissure between those who wield human rights language and the people it is meant to serve is that “‘human rights’ has increasingly become the specialized language of a select professional cadre with its own rites of passage and methods of certification.”

²²⁴ See 2.3 fn 126 and fn 127.

²²⁵ S Hassim. “The Gender Pact and Democratic Consolidation: Institutionalizing Gender Equality in the South African State.” (2003) 29(3) *Feminist Studies* 504 at 507.

Another factor that may potentially dilute the appeal of rights discourse is that it is often used in ways that convert people's real experiences into empty abstractions.²²⁶ These abstractions would be particularly acute within formal legal processes that value impartiality and in which emotion may often be regarded as inimical to reason.²²⁷ An important dimension of disabled people's struggles has arguably been the articulation of their experiences in ways that challenge damaging and often generally-accepted assumptions that they are helpless and in need of a cure or, failing that, charity. If rights discourse smothers narratives that can promote better understandings of disabled people's experiences and their viewpoints, it becomes oppressive.

A related concern is that meaningful social change has to be preceded by significant numbers of people realising that they are implicated in a social problem and showing a willingness to act. However, as Minow points out, "[t]he ways in which we talk about social problems disincline people to identify themselves as persons burdened by those problems. The ways we talk also allow individuals to feel remote from other people's problems."²²⁸ Within employment spheres, underlying views on how employers should relate to employees and the social commitments employers should bear will influence this aspect. We therefore have to remain self-conscious about how we use language, including rights languages, to reference disability, especially in light of our relationships to disability and to disabled people. This issue will be of particular relevance in Chapter 5, when I examine how disability is

²²⁶ M Tushnet. "An Essay on Rights." (1984) 62(8) *Texas Law Review* 1363 at 1364.

²²⁷ See M Minow. "Words and the Door to the Land of Change: Law, Language and Family Violence." (1990) 43(6) *Vanderbilt Law Review* 1665 (hereinafter referred to as "Minow 'Land of Change'") for a critique of how the language and processes in courts and bureaucracies often dilute people's experiences of domestic violence. This is done by invoking the distinction between public and private, as well as the virtues of rational reason in contradistinction to emotional, subjective decision-making. See, also, MC Nussbaum. "The Use and Abuse of Philosophy in Legal Education." (1993) 45(6) *Stanford Law Review* 1627, who discusses the way in which emotion is viewed in the law: "A simple polar opposition between emotion and reason and even in some cases between emotion and moral judgment is commonly relied on both by those who believe that emotions have no place in judicial thinking and by those who believe that they do. Nobody pauses to ask what, more precisely the relationship between emotion and reason actually is, what emotions themselves are, whether and how they are based on belief, whether and how they embody conceptions of their objects, whether and how they can be modified by argument. These are the elementary starting points for philosophical investigations of emotion, from Plato on through Ronald de Sousa. There is a remarkable degree of consensus in recent philosophical work – and in anthropological and psychological work as well – that emotions are not just mindless pushes and pulls, but forms of perception or thought highly responsive to beliefs about the world and changes in beliefs. Nonetheless judges proceed as if none of this discussion were taking place."

²²⁸ Minow 'Land of Change' 1686.

constructed in the guidelines to employers on the employment of disabled persons.²²⁹

The scope of this work does not allow for a discussion on how to mitigate these tensions. The premises from which the subsequent discussion follows bear mention, however. Firstly, the emphasis is on giving content to rights in concrete cases,²³⁰ although it is accepted that courts may not always be the best arbiters of what is required. This is particularly true when solutions have to be creative and in response to individual needs within localised circumstances.²³¹

The second premise relates to the traditional distinction between civil and political rights on the one hand and economic, social and cultural rights (hereinafter referred to as 'social rights') on the other.²³² As Stein has noted, recent identity-specific

²²⁹ See 5.5.1.

²³⁰ Nedelsky (at 143) writes: "Once we acknowledge the changing and contested quality of basic rights, the problem of protecting them from democratic abuse is transformed. We do not have to abandon the basic insight that democracy can threaten individual rights, but we must see that the problem of defending individual rights is inseparable from the problem of defining them." This premise is emphasised, particularly in light of the criticism that has been leveled at the Constitutional Court for its tendency to reason within a loose framework of abstract values rather than by giving content to rights: See, for example, See S Woolman. "The Amazing, Vanishing Bill of Rights." (2007) 124(4) *South African Law Journal* 762, who asserts (at 763) that "[f]laccid analysis in terms of three vaguely defined values – dignity, equality and freedom – almost invariably substitutes for more rigorous interrogation of constitutional challenges in terms of the specific substantive rights found in Chapter 2 of the Constitution. If the drafters of the Constitution had intended such a substitution, the structure and the language of the Bill of Rights would have reflected that intention. It doesn't. Moreover, this strategy – of speaking in values – has freed the court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases, unmoored from its own precedent." He goes on to state that the vagueness that ensues as a result of this direct resort to values violates the rule of law because it "makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally." See, also, A Cockrell. "Rainbow Jurisprudence." (1996) 12(1) *South African Journal on Human Rights* 1, who argues (at 11-12) that in some instances the Constitutional Court has invoked values in ways that assume "normative harmony rather than normative discord" when it is clear that values – for example, freedom and equality – "will not always pull in the same direction."

²³¹ While it is understandable that courts are weary of making decisions that could have far-reaching budgetary and other consequences, judicial officers do have remedial flexibility that allows them to be sensitive to separation of powers concerns (Davis, Macklem and Mundlak 520-521). Rather than conceiving the role of courts as being to impose a constitutional order, we would be better served if we viewed courts as being one set of contributors to the building of a constitutional order (JS Liebman and CF Sabel. "A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform." (2003) 28(2) *New York University Review of Law and Social Change* 183 at 281).

²³² At international level and in most domestic systems, social rights are marginalised as compared to so-called civil and political rights. P Hunt. *Reclaiming Social Rights: International and Comparative Perspectives*. (1996) asserts (at 9) that although social rights are marginalised at both levels, they are better recognised at the international level than the national. See, also, P Alston. "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights."

human rights instruments have integrated both types of rights.²³³ The consequences of this integration as a result of an increased focus on social rights²³⁴ were described succinctly by Simon Deakin:

“As the social claims are framed in the language of civil and political rights, they become accommodated to certain aspects of neo-liberal economic logic. This is a process with unsettling and unpredictable effects. On the one hand, market discourses, based on notions of contract, competitiveness, and efficiency, enter the field of labour and social law; on the other, market relations are infused by notions of equality of access to economic resources drawn from the jurisprudence of social rights. In both respects, the familiar division between the ‘social’ and the ‘economic’ is blurred.”²³⁵

When we provide protection from discrimination and when we seek the creation of spaces for people with disabilities to work and have that work recognised, we have to address the vexed question of how such measures fit within an orthodoxy that has the market economy and private law as the seemingly neutral, objective arbiters of how relationships between various economic actors are to be constructed. Williams points out that the trend in countries that hold global economic power has been to subsume welfare policy into private law: “At best, welfare smooths out rough edges

(1987) 9(3) *Human Rights Quarterly* 332 at 351 (“[T]he content of the Covenant on Economic, Social and Cultural Rights was not based upon any significant bodies of domestic jurisprudence as was the case with civil and political rights. [...] [T]he range of rights recognized in the [Covenant on Economic, Social and Cultural Rights] was, with the exception of labor-related rights, considerably in advance of most national legislation”). Davis, Macklem and Mundlak 511 offer a comparison of social rights adjudication in Canada, Israel and South Africa, respectively. These authors note (at 515) that while the three jurisdictions differ in the extent to which social rights are formally recognised, the status of social rights is the subject of ongoing debate and in all three countries there exists “uneasiness about the constitutional consequences of social citizenship”.

²³³ Stein ‘Human Rights’ 110.

²³⁴ The term ‘social rights’ is used here to denote a whole range “from the right to a modicum of economic welfare and security to the right to share in the full in the social heritage and to live the life of a civilized being according to the standards prevailing in society” (TH Marshall. *Citizenship and Social Class*. In: J Manza and M Sauder (eds). *Inequality and Society: Social Science Perspectives on Social Stratification*. (2009) 148 at 149). Marshall 148 proposed this definition of social rights as part of his division of citizenship into three parts or elements, namely civil, political and social: “The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. [...] By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body.”

²³⁵ S Deakin. *Social Rights in a Globalized Economy*. In: P Alston (ed). *Labour Rights as Human Rights*. (2005) 25 at 26.

of the free market (what are technically called ‘market imperfections’ or ‘externalities’).”²³⁶ Individual autonomy is emphasised more than the construction of mutually supportive relationships. Williams therefore argues that any progressive critique has to question the distributional consequences of the background rules and assumptions that govern the so-called free market.²³⁷

The themes extrapolated from the discussion of social understandings of disability in the previous chapter²³⁸ offer an opportunity to engage with how the background rules and assumptions in respect of equality law, and anti-discrimination law in particular, affect disabled people. It necessarily entails what Deakin terms the blurring of the economic and the social. While this work does not engage extensively with where the line ought to be drawn in terms of state intervention in what is regarded as an autonomous market, the starting point is that private law rules that govern the market give effect to distributional choices. These choices are reflected at various stages, including the content we give to rights and our construction of the duties that flow from such rights. We therefore have to examine those aspects closely at various stages – when considering the content and scope of the right to equality, when deciding whether discrimination is justifiable or not, when analysing the processes through which disabled people can vindicate their right to equality and when assessing the monitoring and evaluation of progress in the realisation of disabled people’s rights in the work context.

It is recognised that the right to equality is not the only right that will be implicated in the struggles disabled people are fighting and will continue to fight. In many instances, choices will have to be made as to whether to frame a claim in terms of the right to equality or in terms of a socio-economic right such as the right to access housing, health care or social security. The intersections of the right to access to social security and equality in the context of the promotion of access to work for disabled persons will be discussed in Chapter 6.

²³⁶ LA Williams. Beyond Labour Law’s Parochialism. In: J Conaghan, RM Fischl and K Klare (eds). *Labour Law in an Era of Globalization: Transformative Practices and Possibilities*. (2000) 93 at 99.

²³⁷ Williams 100-101.

²³⁸ See 2.3.3.

3.3 The substantive approach to equality

One of the central features of the Constitutional Court jurisprudence is its insistence, at least in principle, that our Constitution requires a substantive, as opposed to merely a formal, approach to equality.²³⁹ Ngcobo J in *Bato Star* reminds us why this is so:

“In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.”²⁴⁰

Fredman explains the distinction between and the effects of the two articulations thus:

“Formal equality is premised on an abstract individual, judged on personal merit. Born out of the struggles against slavery, racism, and sexism, formal equality insists that such group-based characteristics are irrelevant; and seeks to replace their use in allocative decision-making by merit-based criteria. In doing so, however, formal equality fails to recognise that it is only in some contexts that these characteristics are irrelevant and detrimental. The ongoing effects of past discrimination mean that the opportunities and life course of many continue to be affected by their race, ethnicity or gender. [...] Instead, formal equality holds out as universal and neutral the characteristics of the dominant group, expecting conformity to the norm as the price for equal treatment.”²⁴¹

²³⁹ See, inter alia, *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) para 42; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 61; *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 31.

²⁴⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 74.

²⁴¹ S Fredman. “Providing Equality: Substantive Equality and the Positive Duty to Provide.” (2005) 21(2) *South African Journal on Human Rights* 163 at 165. S Fredman. Facing the Future: Substantive Equality Under the Spotlight. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) (hereinafter referred to as “Fredman

In another contribution, she usefully summarises some of the principal characteristics of substantive equality: It views the individual within his or her social context and focuses on the disadvantage caused by a prohibited ground rather than the prohibited ground itself; it chooses to focus on outcomes more than treatment; it views identity and difference in a positive light; it seeks to advance individuals rather than to ensure only consistency; and it transcends fault to require positive duties to respect, protect, promote and fulfil.²⁴²

One of the central building blocks of substantive equality is its linking of status and disadvantage.²⁴³ Status refers to those individual and group characteristics that have made people targets of oppression and exploitation. These include the so-called prohibited grounds of discrimination. Disadvantage connotes socio-economic or material disadvantage. This linking of status and disadvantage requires us to consider how we construct status and disadvantage, respectively, as well as their interrelationship. The rest of this chapter poses some of these questions in the context of employment equity for disabled people, relying on some of the insights gleaned from the discussion on social understandings of disability in Chapter 2.

Before we analyse the law as manifested in legislation and jurisprudence, let us consider how we formulate what we want substantive equality to achieve. Hepple notes that equality as an ideal has been given at least seven different meanings:

“(1) respect for equal worth, dignity and identity as a fundamental human right; (2) eliminating status inequality and disadvantage; (3) consistent treatment/formal equality; (4) substantive equality of opportunity; (5) equality of capabilities; (6) equality of outcomes; (7) fairness.”²⁴⁴

‘Substantive Equality Under the Spotlight’”) 15 at 17 notes that formal equality, although it clearly has its limitations, has wrought significant positive change: “It has taken many years of political struggle to reach the point of recognition that gender and race are irrelevant criteria for key political and civil rights. Political thinkers from Aristotle onwards regarded gender as a relevant criterion for access to citizenship rights, ascribing only to men the rationality required to qualify as a subject of rights. It hardly needs to be stated that the key initial achievement of the new democracy in South Africa was to remove all racial references from the criteria for access to basic rights.”

²⁴² Fredman ‘Substantive Equality Under the Spotlight’ 18.

²⁴³ Fredman ‘Substantive Equality Under the Spotlight’ 15.

²⁴⁴ B Hepple. *Equality: The Legal Framework*. (2014) 18.

All but one – consistent treatment/ formal equality – could be argued to fall under the rubric of substantive equality. This illustrates that, while we may agree that, in principle, substantive equality is to be preferred over formal equality, we may differ on how we ought to conceive of substantive equality.

The intention here is not to examine which specific notion of substantive equality is to be preferred, because it may be that one notion is effective in certain situations, while others are more suited to different circumstances. Rather, the approach here will be to focus on three formulations – equality of opportunity, equality of results or outcomes and equality of capabilities and to consider these formulations in the light of debates on social understandings of disability within disability studies. The equality of opportunity and equality of outcomes dichotomy has traditionally been prominent in debates on substantive equality, while equality of capabilities is increasingly recognised as an important perspective that undergirds approaches to human development.

3.3.1 Equality of opportunities and equality of results

Equality of opportunities, which is the most prevalent approach in the international context, is based on the notion that arbitrary factors over which people have no control, such as race, gender and disability, should not dictate those people's life chances.²⁴⁵ On the face of it, this seems an uncontroversial proposition. However, as Frankel points out, the universal appeal of equality of opportunity should arouse suspicion.²⁴⁶ Some commentators have pointed out that equality of opportunity can carry within it vastly opposing ideals.²⁴⁷ It can house a libertarian type of equality that refers to equality of 'procedural' opportunities such as equal opportunity to apply for a job. The underlying assumption is that societal structures are mostly fair and will allow deserving, hard-working individuals to rise to the top.²⁴⁸

²⁴⁵ Quinn et al 'UN Human Rights Instruments' 17.

²⁴⁶ C Frankel. "Equality of Opportunity." (1971) 81(3) *Ethics* 191 at 192.

²⁴⁷ Ibid.

²⁴⁸ In this formulation, equality of opportunity could be reduced to the removal of supply-side barriers without efforts to equip marginalised groups to benefit from such removals (S Fredman. "Changing the Norm: Positive Duties in Equal Treatment Legislation." (2005) 12(4) *Maastricht Journal of European and Comparative Law* 369 (hereinafter referred to as "Fredman 'Changing the Norm'") at 376).

Alan Freeman argues that, in the American context, the “myth” of equality of opportunities has been perpetuated by people across the political spectrum.²⁴⁹ In his view, the basis of equality of opportunity is individualism, which “does not permit one to notice the [...] reality of a pervasive and recurring class structure.”²⁵⁰ The deep-seated cultural valorisation of the “self-made” person with outstanding talents creates a culture of competition in which one has to be more deserving than others.²⁵¹ While such a culture may have its advantages, it may also exact heavy personal tolls – on those who have made it and those who have not – and impact negatively on the formation and maintenance of mutually supportive social relationships.²⁵²

Atypical or impaired bodies disturb this emphasis on individualism, which is premised on the body as a “compliant instrument of the limitless will.”²⁵³ As Miceli notes,

“[T]he reality is that no human body or mind (regardless of disability) is —a ‘compliant instrument of the limitless will,’ despite the rhetoric of liberal individualism predicated that all citizens are meant to be economically self-sufficient and independent in thought and action. This ideology is premised on the belief that people can do whatever they want to do (such as climbing Mount Everest or being a star basketball player) as long as they put their minds to or will themselves to accomplishing the task at hand. Furthermore, the rhetoric employed by this ideology intentionally renders any disability as a character flaw as espoused by the failure of one’s —limitless will to make his or her body and/ or mind a compliant instrument.”²⁵⁴

²⁴⁹ A Freeman. “Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay.” (1988) 23 *Harvard Civil Rights-Civil Liberties Law Review* 295 at 362.

²⁵⁰ Freeman 363.

²⁵¹ Freeman (at 364-374) describes how what he perceives to be an unduly individualist culture operates within American academia.

²⁵² Freeman (at 376) observes: “The world of perfectly realized meritocracy might well be an unhappy one for many if not most of its residents.”

²⁵³ R Garland Thomson. *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature*. (1997) 43. She notes (at 26) that even within emancipatory movements that emphasise other identity categories, for example some feminist movements, assumptions are made based on “the liberal ideology of autonomy and independence”, which may undermine some disabled women’s struggles.

²⁵⁴ MG Miceli. “The Disavowal of the Body as a Source of Inquiry in Critical Disability Studies: The Return of Impairment?” (2010) *Critical Disability Discourse/Discours Critique dans le Champ du Handicap* 2 at 4.

Equality of opportunity does not necessarily have to be as formal and individualistic as described by Freeman.²⁵⁵ It may also connote a richer equality that not only considers procedural opportunities, but people's capacities to make use of these opportunities.²⁵⁶ This latter formulation would be more amenable to redistribution and, if one moves along a continuum, may eventually evolve into an equality of outcomes approach.²⁵⁷ This porous boundary between the two concepts has led Fredman to opine that the equality of opportunity/ equality of result dichotomy is "less than helpful", as both concepts can be applied narrowly or expansively.²⁵⁸ This is also why these concepts are discussed under the same heading here, even though, theoretically, they appear to be distinct.²⁵⁹

Equality of results, rather than focusing on inputs, requires that every person, regardless of his or her ability to contribute to society, is entitled to a minimum level of social and economic protection. Standard articulations of equality of results have been criticised for not engaging adequately with what it is that we are seeking to equalise. Is it resources, welfare, happiness?²⁶⁰ Equality of outcome has also been argued to "deny the importance of individual responsibility and choice."²⁶¹ People should not envy others' prosperity if such other individuals have made better choices that caused them to be better off. This latter criticism would clearly emanate from those advocating a procedural equal-opportunities approach.

²⁵⁵ More substantive conceptions of equality of opportunity have been interpreted by some commentators as being different from a commitment to a strict meritocracy – see D Michailakis. "When Opportunity is the Thing to be Equalised." (1997) 12(1) *Disability and Society* 17 at 25.

²⁵⁶ RM Veatch. *The Foundations of Justice: Why the Retarded and the Rest of Us have Claims to Equality*. (1986) 123-125.

²⁵⁷ Ibid.

²⁵⁸ Fredman 'Changing the Norm' at 376. She further stresses that "[o]pportunities are difficult to quantify and they are frequently reduced to results for the purposes of monitoring or impact assessment." See, also, A Phillips. "Defending Equality of Outcome." (2004) 12(1) *Journal of Political Philosophy* 1 at 13 who argues that in cases of unequal political representation between different genders and races, equality of opportunity may be the primary objective, but equality of outcome will be the test for identifying whether this objective is achieved.

²⁵⁹ Ngwena 'Search for Equality' at 339 argues that equality of outcomes is more radical than equality of opportunity because it unambiguously concerns itself with just outcomes and redistribution. This perception is shared widely, as noted by Phillips at 2: "In both academic and popular discourse, the pursuit of outcome equality has been regarded as a politics of envy, an attack on anyone whose aspirations or achievements stray above a supposed norm. [...] Politicians have been particularly down on the politics of envy, and mostly opt for what they see as the less controversial equality of opportunity: of course people should not expect to end up with the same bundle of commodities or same level of happiness, but it is fair enough that they should expect to have the same opportunities to thrive."

²⁶⁰ Phillips 1.

²⁶¹ Ibid.

Apart from philosophical objections to an equality-of-outcomes paradigm, there may be difficulties in measuring and interpreting results.²⁶² Fredman points out that equal pay or equal representation between men and women in the workforce may be easily understood, but it is more difficult to quantify results in respect of services.²⁶³ An example would be how to measure equality of results in respect of the medical services to which different groups have access, particularly if the health care needs of the respective groups are not the same.

Fredman also warns that even if results are apparent, qualitative factors are relevant to interpreting these results and interpreters will have to be sensitive to context when doing so.²⁶⁴ She cites the gender gap as an example:²⁶⁵ a narrowing of that gap in a particular sector may just mean that men's salaries have decreased, or that overall salaries have diminished. Similarly, an increase in the number of women in higher pay grades may also mean that more women are conforming to male norms by, for example, leaving child care work to other, often low-paid women. From this example, it is apparent that sensitivity to contextual factors will require us to make social choices that strike appropriate balances between remedying unequal outcomes through a focus on individuals and those achieved through structural changes. As will be discussed in Chapter 5, this balance is particularly important when we consider the utility of reasonable accommodation for specific disabled people, as opposed to structural changes to norms and processes that allow more disabled persons to participate in their communities.²⁶⁶

3.3.2 Equality of capabilities

Equality of capabilities aims to address some of the shortcomings or gaps in the two approaches discussed above. The capability approach was developed in the 1980s by Amartya Sen and Martha Nussbaum in the context of human development,

²⁶² Fredman 'Changing the Norm' 376.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ See 5.6.

specifically assessing people's well-being and quality of life.²⁶⁷ Nussbaum, in particular, has written extensively about the relationship between capabilities and human rights and is explicit in her use of the capabilities approach as a partial theory of justice.²⁶⁸

The capabilities approach centres on 'functionings', namely "what a person is able to do or be".²⁶⁹ A 'capability' is the opportunity someone has to achieve a set of functionings she has reason to value.²⁷⁰ This allows us to distinguish between "(i) whether a person is actually able to do things that she would value *doing*, and (ii) whether she possesses the *means or instruments or permissions* to pursue what she would like to do (her actual ability to do that pursuing may depend on many contingent circumstances) [emphasis in the original]."²⁷¹

The capabilities approach combines the substantive-opportunities and outcomes approaches, since it focuses on what people have the opportunity to achieve. It does not measure outcomes in terms of utility or access to resources, because it acknowledges human diversity in our abilities to convert resources into functionings.²⁷² It also recognises that access to resources is not just the result of personal choice and activity.²⁷³ Furthermore, because capabilities constitute the freedom to choose certain functionings and not the functionings per se, they show respect for people's autonomy to choose which functionings they want to achieve for

²⁶⁷ C Harnacke. "Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention." (2013) 41(4) *Journal of Law, Medicine and Ethics* 768 at 769; H Hanisch. "Book Review: Frontiers of Justice. Disability, Nationality, Species Membership by Martha Nussbaum." (2007) 9(2) *Scandinavian Journal of Disability Research* 133 at 135.

²⁶⁸ Harnacke 769; Hanisch (at 133) notes that Nussbaum aims to "rework contractual theories of justice".

²⁶⁹ A Sen. "Human Rights and Capabilities." (2005) 6(2) *Journal of Human Development* 151 (hereinafter referred to as "Sen 'Human Rights and Capabilities'") at 153. Functionings encompasses a wide range of 'doings' and 'beings', such as having bodily health and integrity, being able to control one's environment, developing good self-esteem and being socially well-integrated (see M Toboso. "Rethinking Disability in Amartya Sen's Approach: ICT and Equality of Opportunity." (2011) 13(2) *Ethics and Information Technology* 107 at 109).

²⁷⁰ A Sen. "Freedom of Choice: Concept and Content." (1987) www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-25/files/82530817594427220/default/WP25.pdf (Accessed: 6 February 2015) (hereinafter referred to as "Sen 'Freedom of Choice'") 14.

²⁷¹ Sen 'Human Rights and Capabilities' 153.

²⁷² Sen 'Freedom of Choice' 14.

²⁷³ B Hepple. The Aims and Limits of Equality Laws. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) 10.

themselves.²⁷⁴

Sen points out that freedom has both a procedural and an opportunity dimension.²⁷⁵ To illustrate the distinction, he uses the example of a woman, Natasha, who wants to stay at home. If an authoritarian ruler were to tell Natasha that she must stay at home, the opportunity aspect of her freedom is not curtailed as substantially as if she was forced to go out (she is doing what she would have done anyway), but the process aspect is immediately violated because she is not allowed to choose. Sen is at pains to point out²⁷⁶ that the capabilities perspective “has considerable merit in the assessment of the opportunity aspect of freedom”, but “cannot possibly deal adequately with the process aspect of freedom”. This is so because capabilities focus on individual advantages and do not say enough about the “fairness or equity of the processes involved, or about the freedom of citizens to invoke and utilise procedures that are equitable”.²⁷⁷

Another important normative question is the consideration of why we value freedom. Sen notes that in most economic theories, freedom is regarded as instrumental – it is valued because it is a means to attain access to resources or commodities.²⁷⁸ However, theorists such as James Buchanan and Karl Marx have argued that freedom has inherent value as an end in itself.²⁷⁹ The choosing itself is of value, regardless of what it gets the person who is choosing.

Some commentators have argued that the focus on individual freedoms means that the approach does not take into account the needs of the broader community. Sen²⁸⁰ acknowledges that evaluative choices about which freedoms to prioritise in given circumstances are inescapable, but chooses not to engage fully in how such priorities are to be determined. He concedes that there may be basic capabilities

²⁷⁴ Sen ‘Human Rights and Capabilities’ 154-155; MC Nussbaum. “Capabilities as Fundamental Entitlements: Sen and Social Justice.” (2003) 9 *Feminist Economics* 33 (hereinafter referred to as “Nussbaum ‘Sen and Social Justice’”) at 49.

²⁷⁵ Sen ‘Human Rights and Capabilities’ 152-153.

²⁷⁶ Sen ‘Human Rights and Capabilities’ 155-157.

²⁷⁷ Sen ‘Human Rights and Capabilities’ 156.

²⁷⁸ Sen ‘Freedom of Choice’ 4.

²⁷⁹ Sen ‘Freedom of Choice’ 2-3.

²⁸⁰ A Sen. “Capabilities, Lists, and Public Reason: Continuing the Conversation.” (2004) 10(3) *Feminist Economics* 77 (hereinafter referred to as “Sen ‘Capabilities, Lists, and Public Reason’”) at 78-80.

that would be in any capability set in any society. However, unlike Nussbaum, he has been reticent to propose a fixed list of capabilities. He offers three reasons for this: First, capabilities are assessed for different purposes and the contents of any list would be contingent upon the reasons for its compilation. Second, social conditions in a specific context may determine priorities. Third, public discussion and democratic deliberations could lead to a better understanding of “the role, reach, and the significance of particular capabilities”.²⁸¹

Nussbaum argues that freedom cannot be seen as a general good and that “[s]ome freedoms contain injustice in their very definition”.²⁸² She therefore regards a list of basic capabilities as indispensable and has compiled an open-ended, broadly-stated, adjustable list of “central human capabilities”.²⁸³ In her view, a list does not prevent a particular community from deciding on implementation and from deliberating on the specific details of the general norms contained in her list.²⁸⁴ It therefore caters to pluralism and can be applied in various social, economic and cultural contexts, while protecting the basic freedoms of marginalised persons.

Sen’s reticence to compile a list of capabilities and his reasons for doing so are arguably relevant in efforts to ensure that disabled persons are able to participate, on an equal basis with enabled persons, in the life of their communities. However, as will be discussed in Chapter 6, difficult questions arise as to which disabled persons want to and are able to work and whether work, as it is structured within society, is inherently exploitative and therefore not an aspiration worth pursuing.²⁸⁵ The complexity of the issues requires that rights and duties are negotiated in procedurally equitable ways that balance the interests of disabled and enabled persons. In the context of access to work, the interests of disabled work seekers, prospective employers and the community in general have to be taken into account.

²⁸¹ Sen ‘Capabilities, Lists, and Public Reason’ 80.

²⁸² Nussbaum ‘Sen and Social Justice’ 46.

²⁸³ Nussbaum ‘Sen and Social Justice’ 41-42.

²⁸⁴ Nussbaum ‘Sen and Social Justice’ 47.

²⁸⁵ See 6.2.3.2.

3.4 Capability, disability and substantive equality

While the capabilities approach has been simplified here and many of its challenges have not been discussed to any great extent, its emphasis on freedom and human diversity is useful in thinking about the normative underpinning of rights.²⁸⁶ It is a general conceptual framework that allows us to question and examine general ethical norms, while at the same time leaving space for us to consider its practical contributions and actual workings in specific circumstances.²⁸⁷ A focus on the latter aspect is valuable because it allows us to test implementation against stated objectives and to ‘strip down’ the theory in order to make it more accessible and user-friendly and less prone to misinterpretation.²⁸⁸ This section will consider aspects of the general objectives of the capability approach, while its implications in specific circumstances will be discussed when analysing disability equality jurisprudence below.

3.4.1 Formulation of the outcomes to be achieved

The first general feature of the capability approach that is useful for thinking about disability rights is its identification of the most relevant outcome as the freedom to choose a set of functionings. In this way, there is express recognition of the fact that many disabled people may not achieve the same functionings with the same basket of resources as enabled people.²⁸⁹ Furthermore, the fact that general utility is not the outcome also means that disabled people who are content with their functional differences are not regarded as being less well-off.²⁹⁰ This implies a positive conception of difference and is consistent with a broader approach of not viewing the

²⁸⁶ Harnacke 768.

²⁸⁷ S Alkire. “Why the Capability Approach?” (2005) 6(1) *Journal of Human Development* 115 at 116.

²⁸⁸ Ibid.

²⁸⁹ Sen ‘Freedom of Choice’ 12-14. He cogently argues (at 14) why a focus on commodities or primary goods does not adequately reflect human diversity:

“The traditional approaches seem to concentrate on choices over commodity bundles. The Rawlsian approach provides inter alia another view of freedom of choice, related to holdings of primary goods. But primary goods as well as commodities and incomes are means to ends. If the positive conception of freedom is to reflect our ability to achieve valuable functionings and well-being, then there is clearly a case for viewing this freedom in terms of alternative bundles of functionings that a person may be able to achieve [emphasis in the original].”

²⁹⁰ Sen ‘Freedom of Choice’ 15.

status of disability as problematic, but rather focusing on the disadvantages associated with that status.

The foundational acknowledgement of human variation means that disability is viewed as one of several reasons why people vary in their ability to convert personal means into functionings. Sen offers a non-exhaustive list of factors that may influence people's ability to convert means into functionings.²⁹¹

“(1) *physical or mental heterogeneities among persons* (related, for example, to disability, or proneness to illness); (2) *variations in non-personal resources* (such as the nature of public health care, or societal cohesion and the helpfulness of the community); (3) *environmental diversities* (such as climactic conditions, or varying threats from epidemic diseases or from local crime); or (4) *different relative positions vis-a-vis others* (well illustrated by Adam Smith's discussion, in the *Wealth of Nations*, of the fact that the clothing and other resources one needs 'to appear in public without shame' depends on what other people standardly wear, which in turn could be more expensive in rich societies than in poorer ones)” [emphasis in original].

Although it is not clear from this passage whether Sen conceives of disability itself as something other than a personal variation, it is possible to interpret his formulation as supportive of an individual approach to disability. The more generous interpretation would make allowance for the possibility that he is referring to personal impairment, rather than disability, as a partly or wholly social phenomenon. It could also lead to the conclusion that his identification of individual and external factors as relevant to well-being is consistent with social understandings of disability.

3.4.1.1 Equality, dignity and freedom

The fact that outcomes are measured in terms of people's freedom to choose also implies that the capability approach views each human being as an end in herself. This is consistent with the normative underpinnings of social understandings of

²⁹¹ Sen 'Human Rights and Capabilities' 154.

disability as well as the aims of substantive equality as formulated by the South African Constitutional Court. As expressed by Quinn and Degener,

“[r]ecognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others. This view militates strongly against the contrary social impulse to rank people in terms of their usefulness and to screen out those with significant differences.”²⁹²

The Constitutional Court has repeatedly affirmed its view that the bedrock value upon which equality rests is dignity.²⁹³ Ackermann, who was a judge on the Constitutional Court when it developed its approach to equality,²⁹⁴ argues that “as a

²⁹² Quinn et al ‘UN Human Rights Instruments’ 14. In *S v Dodo* 2001 (3) SA 382 (CC) para 38, Ackermann J emphasised that human beings “are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.” This formulation is consistent with the ethical conception of dignity as formulated by Emmanuel Kant, quoted in LWH Ackermann. “Equality and Non-Discrimination: Some Analytical Thoughts.” (2006) 22(4) *South African Journal on Human Rights* 597 at 609-610:

“In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity. What is related to general human inclinations and needs has a *market price*; that which, even without presupposing a need, conforms with a certain taste, that is, with a delight in the mere purposeless play of our mental powers, has a *fancy price*; but that which alone something can be an end in price, but an inner worth, that is, *dignity* [emphasis in the original].”

And further:

“[A] human being regarded as a *persona*, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them [emphasis in the original].”

²⁹³ The Court has distinguished between reliance on dignity as a value that underpins equality on the one hand, and violations of the right to dignity on the other. In the words of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 124,

“[t]he former is based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under s 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody stopped at a roadblock. It could also be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.”

²⁹⁴ The judgment he wrote with O'Regan and Sachs in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) was the first to cement the principle that unfair discrimination “principally means

matter of clear principle, the value of human dignity, and nothing else, is what gives meaning in the law to the concepts of equality and non-discrimination”.²⁹⁵

He has elaborated on this contention in his book *Human Dignity: Lodestar for Equality in South Africa*. One of the central arguments in the book is

“that the words ‘equality’, ‘equal’, or ‘unequal’, in order to be meaningful, can only be used as *attributive* parts of speech and not as *predicative* nouns or adjectives. The terms ‘attributive’ and ‘predicative’ are, however, not used [...] in a strictly grammatical sense, but in a special logical sense that requires identification of the object referred to (human dignity, for example), in order that the appropriateness of the attributive term (equal or equality) can be judged. The vital question, so consistently ignored in legal equality analysis, is: ‘With regard to what are all human beings equal? [emphasis in the original]’”²⁹⁶

The Constitutional Court’s answer to the question posed by Ackermann is that people ought to be equal in terms of the respect and concern with which they are treated.²⁹⁷ They have this worth by virtue of being human and whether there has been infringement of their dignity is to be objectively assessed.²⁹⁸

Various objections have been raised to the dignity-centred approach to equality. Some commentators argue that there is no constitutional justification for this approach and that overreliance on dignity renders the value of equality nugatory

treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity” (at para 31).

²⁹⁵ See Ackermann at 599. He renounces the dictum in *Prinsloo v Van der Linde and Another* para 33 that other forms of discrimination may not impact on dignity, but nevertheless “affect persons adversely in a comparably serious manner.”

²⁹⁶ L Ackermann. *Human Dignity: Lodestar for Equality in South Africa*. (2012) 21.

²⁹⁷ *Prinsloo v Van der Linde and Another* para 32; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 28 (dignity lies in the acknowledgment of “the value and worth of all individuals as members of our society”); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 27 (“At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity”).

²⁹⁸ R Krüger. “Equality and Unfair Discrimination: Refining the Harksen Test.” (2011) 128(3) *South African Law Journal* 479 (at 489) notes that while this Kantian conception of dignity does not take into account the subjective feelings of the complainant, the Court has on at least one occasion formulated an approach that takes into account the complainant’s feelings (see *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 81, in which the Court stated that “[n]o members of a racial group should be made to feel that they are not deserving of equal concern, respect, consideration and that the law is likely to be used against them more harshly than others who belong to other race groups”).

within the constitutional scheme.²⁹⁹ Others view the reliance on dignity as too individualistic and inimical to a transformative equality jurisprudence that places group-based material disadvantage at the centre of struggles for equality. In the words of Albertyn and Goldblatt,

“[T]he replacement of disadvantage with dignity returns us to a liberal and individualised conception of the right. The centrality of disadvantage, vulnerability and harm, and their connotation of group-based prejudice – the essence of the right – is lost. [...] The enquiry tends towards a concern with individual personality issues rather than an understanding of more material systemic issues and social relationships. The definition of equality in terms of dignity or disadvantage is not an academic debate. It has profound implications for the application of the right to the cases, and for the evolution of our jurisprudence as a whole.”³⁰⁰

Fredman³⁰¹ recognises that the invocation of dignity has at times led to an unfortunate de-linking of substantive equality and socio-economic disadvantage in South African and Canadian jurisprudence. In her view, it has also operated to abstract equality from power relations in society. However, she does not regard these obstacles as insurmountable, and supports her argument by citing the

²⁹⁹ A Fagan. “Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood.” (1998) 14(2) *South African Journal on Human Rights* 220 argues that the dignity-centred analysis lacks a sound foundation. Dignity cannot be imputed into the provisions of the equality clause because the text of the Interim Constitution did not sanction an interpretation of equality that centres on dignity. Thus, for Fagan (at 223), “an act unfairly discriminates if and only if it confers benefits or imposes burdens on some but not others and in doing so infringes either an independent constitutional right or a constitutionally-grounded egalitarian principle.” DM Davis. “Equality: The Majesty of Legoland Jurisprudence.” (1999) 116 *South African Law Journal* 398 laments the Constitutional Court’s choice to place dignity at the centre of equality (“The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of a jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer” (at 413)). He argues for a reasoned explanation as to how equality as a value informs the right to equality (“The Court needs to look at equality as a value which seeks to promote a democratic society that recognizes and promotes difference and individual as well as group diversity and thereby exhibit a commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens” (at 413-414)). See, also, T Loenen. “The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective.” (1997) 13 *South African Journal on Human Rights* 401, who argues that all the rights protected by the Constitution should infuse the interpretation and application of the right to equality.

³⁰⁰ C Albertyn and B Goldblatt. “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality.” (1998) 14 *South African Journal on Human Rights* 248 at 258.

³⁰¹ Fredman ‘Substantive Equality Under the Spotlight’ 19-22.

Constitutional Court's judgment in the *Khosa* case, in which Mokgoro J emphasised that the exclusion of permanent residents from social assistance schemes affected their socio-economic as well as their personality interests.³⁰²

In my view, the concept of dignity is not inherently individualistic; it does not have to operate to exclude structural inequalities. Its malleability may be a weakness, which some commentators have tried to address by suggesting more specific normative objectives for dignity.³⁰³ Others argue that while dignity may be one value that assists us in explaining the ethical foundations of equality, it is too vague to ever assist us in providing clear normative underpinnings for equality because it can house many disparate approaches.³⁰⁴ McConnachie has therefore suggested that instead of examining dignity, our focus ought to shift to how the Constitutional Court actually justifies its decisions in equality cases.³⁰⁵

For purposes of this work, it is not necessary to express a view on the dignity-centred approach to equality. It is not clear to me why one would have to limit the ethical foundations for equality to one specific value. The values, like the rights in the Bill of Rights, can be mutually supportive and interdependent. It is against this backdrop that I propose that the value of freedom can play a more prominent role in underpinning equality for disabled people, particularly as it relates to access to work. This freedom can be viewed within a framework of dignity or viewed as a related, yet independent value.

Why a focus on freedom? Firstly, the nature of the disadvantage disabled people face means that conceptual aspects relating to freedom can crystallise our normative commitments in a way that supports dignity's commitment to viewing people as ends in themselves. If freedom is emphasised, for example, policies for the provision of social services would be planned in a consultative way that respects the autonomy of

³⁰² *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 74.

³⁰³ See Krüger 507-512 and the relevant sources cited therein.

³⁰⁴ B Hepple. Can Discrimination ever be Fair? In: K Malherbe and J Sloth-Nielsen (eds). *Labour Law into the Future: Essays in Honour of D'Arcy du Toit*. (2012) 1 (hereinafter referred to as "Hepple 'Can Discrimination be Fair?'") at 10; C McConnachie. "Human Dignity, 'Unfair Discrimination' and Guidance." (2014) 34(3) *Oxford Journal of Legal Studies* 609 at 611, 616-619.

³⁰⁵ McConnachie 612, 620-628.

service users. If disabled persons wish to work, an emphasis on freedom would lead to disapproval of paternalistic social assistance schemes that do not respect the economic, as well as the social needs of beneficiaries.

The disadvantage disabled people face relates to their social, as well as their economic marginalisation. Albertyn explains that “[s]ocial inequalities construct patterns of inclusion and exclusion in which identity and culture, values and behaviours of a particular group are stigmatised, marginalised and/ or denigrated, while another group is affirmed and privileged.”³⁰⁶ This group may become vulnerable to physical and psychological violence and be politically marginalised.³⁰⁷ Economic inequality, on the other hand, lies in “unequal access to, and distribution of, basic needs, opportunities and material resources”.³⁰⁸ The distinction between economic and status disadvantage is often of no practical significance, as the connection between status-based discrimination and economic discrimination is a close one.³⁰⁹

I will argue more fully in Chapter 6 that, when we provide positive measures to create opportunities for disabled people to earn a living, the conceptual distinction between the procedural and opportunity aspects of freedom, as well as between freedom as inherently valuable and instrumental to achieving other outcomes, becomes of cardinal importance.³¹⁰ Attention to these distinctions will prevent us from addressing socio-economic disadvantage in ways that perpetuate stereotypes and stigmatise disabled people. It may also reduce the risk of infringing on the procedural dimension of disabled people’s freedom while attempting to promote the opportunity aspect of freedom.

A second, related, justification for expanding upon the use of freedom in ensuring access to work is that freedom as used in the capability approach recognises the link between status and socio-economic disadvantage, which is one of the central

³⁰⁶ C Albertyn. Constitutional Equality in South Africa. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) 75 at 76.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ S Fredman. “Redistribution and Recognition: Reconciling Inequalities.” (2007) 23(2) *South African Journal on Human Rights* (hereinafter referred to as “Fredman ‘Redistribution and Recognition’”) 214.

³¹⁰ See 6.3.3.

assumptions of substantive equality. However, because different aspects of freedom are distinguished, the interrelationship between status and disadvantage can arguably be problematised in more sophisticated ways.

One example is that the individual's freedom to choose functionings can be balanced more transparently against communal interests than the more abstractly defined dignity. Such an approach would integrate well with a conceptual framework that views rights as means of constructing power relations in society. It also allows us to have clearer perspectives on the relative weight granted to atomistic and social dimensions of rights. We would still need a separate normative ethical framework to evaluate the relative weights to attach to various freedoms, but a focus on freedom in itself can arguably provide conceptual illumination.

The third reason that I think freedom may be beneficial relates to the political economy of ideas. Freedom is invoked in development economics discourse that takes a people-first approach to productivity. In this way, there is a more discernible link to the labour sphere, which can arguably compete better against deeply entrenched, profit-driven perspectives than abstract appeals to regard people as ends in themselves. This strategic potential is of particular importance in the context of pro-active approaches to equality, which rely on the buy-in of employers and employees at the organisational level. This aspect will be more fully discussed in Chapter 5.³¹¹

A fourth reason for the invocation of freedom is related to the third, namely that capability discourse allows us to address some of the weaknesses of rights discourse. First, it provides economic justifications for the imposition of positive duties and therefore bridges the gap between constitutional rights and their application in the economic sphere. Second, it does not carry the cultural or political baggage that rights discourse does, even though it has been shown that rights precede the Western Enlightenment period and are invoked in different forms in various societies.³¹² Third, because the capability approach directly focuses on what people are able to do and to be, it does not have to jump the hurdle of the public/

³¹¹ See 5.3.4.4.

³¹² Nussbaum 'Sen and Social Justice' 39.

private divide that has hampered the implementation of rights in spheres in which marginalised groups are oppressed. This includes the work sphere.

3.4.2 Ultimate transformational goals

In arguing for the infusion of capability theory into justifications that underpin the right to equality for disabled people in the work sphere, I have aimed to give effect to a transformational vision of substantive equality. Such a vision has the following attributes:³¹³ It emphasises the effect of discrimination on complainants rather than comparing the treatment received by complainants with that experienced by similarly situated individuals. In doing so, it recognises the lived realities of marginalised groups and is sensitive to the social and historical dimensions of inequality. In eschewing equal treatment, it refuses to view difference as inherently negative. Overall, a substantive approach concerns itself with the amelioration and eventual eradication of systemic subordination or disadvantage.

Fredman also identifies four potential aims of equality that have similar content:

“First, it should break the cycle of disadvantage associated with outgroups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail an accommodation and positive affirmation and celebration of identity within community, and, finally, it should facilitate full participation in society.”³¹⁴

Most of the above aims do not expressly incorporate elements of process equity. One could perhaps argue that all the aims have a process dimension and that Fredman’s fourth aim, in particular, could incorporate such a dimension. These aims are also not specific to particular protected groups such as disabled persons. In order to enrich our understanding of the aims in respect of promoting access to work for disabled persons, it is perhaps necessary to think more explicitly about process equity. This aspect is addressed in Chapter 5.

³¹³ The four attributes that follow are identified in C Albertyn. “Substantive Equality and Transformation in South Africa.” (2007) 23 *South African Journal on Human Rights* 253 at 258.

³¹⁴ Fredman ‘Changing the Norm’ 377.

It may also be necessary to consider the particular ways in which disabled persons are excluded from work and from society in general. Ngwena's development of what he terms a "disability method" is a useful articulation of interconnecting considerations that have to animate the assessment of norms, standards or practices that distinguish between disabled and enabled persons.³¹⁵ He articulates these considerations as follows:

"(1) whether the norm, standard or practice is conscious about, or oblivious to, disability as social oppression; (2) whether the norm, standard or practice is dialogic in the sense of admitting a plurality of interactive voices and reflecting equal power relations so as to create space for an egalitarian playing field, or is, instead, monologic in the sense of admitting only a dominant voice and reflecting unequal power relations as to privilege an enabled social group and disadvantage a disabled social group; (3) whether the norm, standard or practice admits the experience and equality aspirations of disabled people as a diverse but distinct social group that has been historically excluded or marginalised in ways that do not essentialise disabled people as a group and as individuals; and (4) if the norm, standard or practice is monologic and exclusionary, how rather than whether it can be reformed to accommodate disability and provide an alternative to existing social structures in a manner that is costless to the person accommodated as part of constructing an inclusive egalitarian society."³¹⁶

Ngwena stresses that all these considerations are interrelated and should not be considered in a separate, formal manner.³¹⁷ Similarly, I argue that Albertyn's characteristics of transformative equality, Fredman's aims of equality and Ngwena's 'disability method' are all mutually reinforcing and offer general normative guidelines when assessing disability equality.

³¹⁵ C Ngwena. "Developing Juridical Method for Overcoming Status Subordination in Disablism: The Place of Transformative Epistemologies." (2014) 30(2) *South African Journal on Human Rights* 275 (hereinafter referred to as "Ngwena 'Developing Juridical Method'") at 303. He developed this method in his LLD thesis (see Ngwena 'Search for Equality' fn 19) completed in 2010, but I have elected to use the most recent source.

³¹⁶ Ngwena 'Developing Juridical Method' 304.

³¹⁷ Ibid.

I also suggest that, in order to achieve these aims, an approach that centres capabilities holds advantages because it recognises:

- “That a positive role is required of institutions in removing barriers or constraints and making sure that the opportunities to flourish are real;
- that some people may need more and different resources to enjoy genuine freedom and fair access to opportunities;
- that a life of genuine and valuable choices for each individual leads to a better society for everybody; and
- that its aims should be to narrow gaps in real opportunities and real freedoms, not by reducing the freedoms of some but by increasing the opportunities of those suffering persistent disadvantage.”³¹⁸

3.5 Concluding remarks

This chapter has considered what rights, and the equality right, in particular, can contribute to disabled persons’ struggle for inclusion. It has emphasised the complementary aspects of social understandings of disability and rights discourse, but has also highlighted possible tensions between what social understandings require and what rights as legal instruments can deliver.

I also considered what substantive equality requires in general terms and suggested that an emphasis on the value of freedom, as well as an approach that centres capabilities, may be beneficial for promoting access to work for disabled persons. Furthermore, I briefly set out possible aims and objectives of transformational equality for disabled persons, as articulated by Albertyn, Fredman and Ngwena.

With these normative considerations in mind, we can now proceed to consider the current employment equity laws and selected state measures to promote access to work for disabled persons. As will become apparent in the analyses that follow, the

³¹⁸ Hepple ‘Aims and Limits’ 11.

transformative potential of these laws is inhibited in various ways, including in the adverse impact of structural disadvantages that prevent disabled work seekers from seeking legal remedies, unequal bargaining power between prospective employers and work seekers, regulatory weaknesses that dilute the impact of attempts to change oppressive organisational norms and the limited role laws play in changing attitudinal barriers. Possible solutions to these challenges will require consultative problem-solving, and this process equity dimension is highlighted throughout.

CHAPTER 4: PROHIBITIONS ON DISCRIMINATION: POTENTIAL AND CONSTRAINTS

4.1 Introduction

In the previous chapters, much of the discussion was focused on the social contingency of disability and the consequences of recognising this social dimension, the normative underpinnings of the right to equality and the aims of substantive equality in general, as well as in respect of disabled persons in particular. The next three chapters proceed to the legal framework that operates to promote access to work for disabled persons: the prohibition on discrimination; the positive non-discrimination duties and affirmative action duties imposed on employers and the monitoring and enforcement mechanisms that have been put in place; and selected positive duties on government.

4.1.1 Broad objectives

This chapter has two broad objectives. The first is to set out the salient features of the non-discrimination framework provided by the Constitution, the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). The second is to examine the duty on employers to refrain from discriminating against disabled work seekers. Specific attention will be paid to how these laws incorporate social understandings of disability, their potential to contribute to substantive equality, as well as the constraints within which they operate.

4.1.2 The approach to the equality analyses in this chapter

In keeping with the principle of constitutional avoidance,³¹⁹ the EEA or the PEPUDA would be the first port of call for aggrieved persons who allege unfair discrimination, unless the remedy they seek is the invalidation of a legislative provision on constitutional grounds. However, the ‘test’ for unfair discrimination articulated by the Constitutional Court in *Harksen v Lane NO and Others*³²⁰ is the cornerstone of the discrimination provisions in the PEPUDA and has been applied in the context of the EEA. Differences in the application of these two Acts will therefore be noted, but not elaborated upon. Similarly, differences between the Acts and s 9 of the Constitution will be noted, but will not be the focus of this discussion.

This approach is chosen in light of the primary research question. That question requires that our principal engagement is with the contextual factors that inform how courts, legislators, human resources professionals and employees may construct working definitions of disability and view positive duties that may be imposed to remedy disabled people’s disadvantage. The technical application of ‘tests’ by courts, while important, will therefore receive less attention and will only be discussed insofar as these implicate views on how to construct disability for purposes of anti-discrimination.

4.1.3 Chapter structure

This chapter is structured as follows: Part 2 discusses the salient equality provisions in the Constitution, the EEA and the PEPUDA. Part 3 then considers the use of contextual factors in the various stages of the equality ‘test’, as set out in *Harksen*, and argues for the development of a more context-sensitive approach to the determination of who should be protected on the grounds of disability. Part 4 examines the current approach to determining who is disabled for purposes of non-

³¹⁹ In *NAPTOSA and Others v Minister of Education, Western Cape and Others* 2001 (2) SA 112 (C) 123I-J, Conradie J stated that where there is no constitutional challenge to the Labour Relations Act (LRA) 66 of 1995, cases have to be brought within the regulatory framework it establishes and that direct reliance on the constitutional right to fair labour practices was therefore unacceptable. See fn 323 for a discussion of the same principle in relation to s 9 and the PEPUDA 4 of 2000.

³²⁰ 1998 (1) SA 300 (CC).

discrimination law. Finally, Part 5 considers the position of disabled work seekers in terms of their ability to utilise these laws as well as the potential of the prohibition on discrimination to contribute to transformative change.

4.2 Legal framework for equality in the labour context

4.2.1 Equality provisions in the Constitution

The Constitution expresses its commitment to equality, both as a founding value and as a justiciable right.³²¹ Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) allows for positive measures that will promote the achievement of equality and that are designed to protect or advance persons or categories of persons that are disadvantaged by unfair discrimination. Sections 9(3) and (4) prohibit discrimination by public and private actors, respectively, on a number of listed, non-exhaustive grounds including disability.³²² Finally, s 9(5) provides that discrimination on a listed ground is unfair unless it is established that the discrimination is fair.

As alluded to above, courts and labour tribunals will consider most instances of unfair discrimination in terms of the EEA and the PEPUDA instead of the Constitution. The dispute resolution processes provided for in the legislation are meant to be more accessible to complainants and tailored to the contexts in which disputes arise. However, where the constitutionality of provisions in the EEA or the PEPUDA is challenged, those provisions will be tested against s 9 of the

³²¹ Equality appears as a value in various parts of the Constitution. It is first mentioned in the preamble, with the recognition that the Constitution was adopted to ensure, amongst other things, that every citizen is equally protected by the law. Section 1 states that South Africa is founded on, inter alia, human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 3 provides that all citizens are equally entitled to the benefits and privileges of citizenship and are equally subject to the duties and responsibility of citizenship. Section 7 emphasises that the Bill of Rights affirms the democratic values of equality, human dignity and freedom. Similarly, s 39 enjoins any court, tribunal or forum to interpret the Bill of Rights in ways that promote equality, human dignity and freedom. Section 36 provides that limitations of rights may only be achieved through laws of general application and to the extent that such limitations are reasonable and justifiable in an open and democratic society based on equality, dignity and freedom.

³²² The listed grounds are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Constitution.³²³ Another instance where the constitutional right will be applied directly is where the remedy sought is the invalidation of a provision in an Act of Parliament.³²⁴ That remedy is only available under the Constitution and the final decision has to be made by the Constitutional Court.³²⁵

4.2.2 Legislation giving effect to the right to equality: Jurisdictional choices

Section 9(4) envisions the enactment of legislation to further give effect to the prohibition on unfair discrimination. Both the PEPUDA and the EEA were enacted in terms of s 9(4). Other legislation also seeks to give effect to the right to equality. The Labour Relations Act (LRA) 66 of 1995, for example, offers employees protection against unfair discrimination in cases of dismissals,³²⁶ rights of association,³²⁷ benefits and unfair practices related to promotion, training or disciplinary action against them.³²⁸ However, since the primary research objectives of this study (see 1.1) relate to disabled people's access to employment, the EEA

³²³ See *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40 in which Langa CJ said the following: "This Court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights'. The same principle applies to the Equality Act."

³²⁴ C Albertyn, B Goldblatt and C Roederer. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act*. (2001) 31.

³²⁵ Sections 172(1)(a) and 167(5) of the Constitution.

³²⁶ Section 187(1)(f) of the LRA provides that a dismissal is automatically unfair if the reason for such dismissal is "that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility." Section 187(2)(a) states that despite s 187(1)(f), a dismissal will be fair if the reason for it relates to the inherent requirements of the particular job.

³²⁷ Section 5 states that nobody is allowed to discriminate against an employee for exercising her rights under the LRA.

³²⁸ Section 186(2) reads:

"'Unfair labour practice' means any unfair act or omission that arises between an employer and an *employee* involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;

(b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;

(c) a failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act [emphasis in the original]."

and the PEPUDA will remain the focus. This approach is not meant to deny the importance of protection against unfair dismissal or unfair labour practices for disabled employees. Many of the contextual factors discussed here may also be relevant to dismissals or labour practices. However, the central research question relates to access to work at first instance and the focus is therefore on recruitment and selection.

In cases where alleged unfair discrimination does not relate to a dismissal or an unfair labour practice, a decision has to be made as to whether the EEA or the PEPUDA applies.³²⁹ Once that choice is made, the case must be decided within the four corners of whichever one of the Acts applies.³³⁰

The prohibition on unfair discrimination in the EEA applies to all employers, regardless of their turnover or the number of people employed.³³¹ It applies in respect of employees already in the employ of the employer, as well as applicants for employment.³³² The EEA defines an employee as:

“any person other than an independent contractor who—

(a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) in any manner assists in carrying on or conducting the business of an employer....”³³³

³²⁹ Section 20(3) of the PEPUDA reads:

“The clerk of the equality court must, within the prescribed period of receiving such notification, refer the matter to a presiding officer of the equality court in question, who must, within the prescribed period, decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions.”

In *Minister of Environmental Affairs and Tourism v George and Others* 2007 (3) SA 62 (SCA) para 5, Cameron J stated that the effect of s 20(3)(a) is that a presiding officer, when receiving an equality complaint, first has to decide on the best forum for the matter to be heard.

³³⁰ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 40. The Court recognised that there may be challenges to the constitutionality of the legislation, but in the absence of such challenges, cases must be decided in terms of the relevant Act.

³³¹ Section 4 (1).

³³² Section 9.

³³³ Section 1.

This definition is relatively open-ended and appears in other labour statutes too.³³⁴ It rests on the common-law distinction between an employee and an independent contractor, which traditionally had been used to determine when an employer should accept liability for the wrongful acts of an employee.³³⁵

Paul Benjamin describes the approach of the South African courts to determining who an employee is as follows:

“Historically, the approach of the South African courts to determining who is an employee shows a trend found in many countries. Initially, the courts sought a single definitive touchstone of the employment relation. Until the 1950s, the courts regarded the employer’s right of control over the employee as the defining element. Later the conventional wisdom accepted that an employment contract could exist (particularly in the case of highly skilled or senior employees) in the absence of control, and the courts asked whether the employee was integrated into the employer’s organization. The vogue of the ‘organization’ test was short-lived, and in 1979 it was rejected as ‘vague and nebulous’. For the last two decades, the South African courts have applied a multi-factoral approach – the ‘dominant impression’ test.”³³⁶

He laments that the factors that have traditionally been considered within the ‘dominant impression’ test do not take adequate account of the relative bargaining power of the parties involved.³³⁷ In his view, the failure to take a purposive, contextual approach to the question of whether a particular category of workers ought to be protected in relation to specific aspects of the labour relationship results in many vulnerable workers being excluded from the protection of labour law.³³⁸ Some legislative amendments have tried to offer partial remedies to these

³³⁴ Section 213 of the LRA first defined ‘employee’ in this way and it is duplicated in the Basic Conditions of Employment Act (BCEA) 75 of 1997 (s 1), the Employment Equity Act (EEA) and the Skills Development Act 97 of 1998 (s 1). The Employment Services Act 4 of 2014 in s 1 states that it uses ‘employee’ as defined in the BCEA.

³³⁵ P Benjamin. Who Needs Labour Law? Defining the Scope of Labour Protection. In: J Conaghan, RM Fischl and K Klare (eds). *Labour Law in an Era of Globalization*. (2000) 75 at 82.

³³⁶ Ibid.

³³⁷ Benjamin 84.

³³⁸ Ibid.

exclusions, but the effectiveness of these is open to question.³³⁹

A restrictive definition of who qualifies as an employee may affect various categories of workers who are in atypical work relationships.³⁴⁰ Some reasons for these workers' atypical status may relate to disability. Disabled people themselves may choose to take on or be forced into non-standard employment. Many employers may choose to employ disabled people only on more informal terms because of prejudice, stigma or harmful stereotypes or because of perceptions that it may be more costly than employing persons without disabilities.

Some reasons may relate to a combination of disability and trends in the labour market itself – one of the key characteristics of the post-apartheid labour market has been a relatively rapid increase in atypical employment, particularly for younger workers³⁴¹ and workers at lower job levels.³⁴² Disabled people are more likely to be

³³⁹ Section 200A of the LRA creates a presumption that a person who is working for another person, regardless of the form of the contract, is an employee if any one or more of the following factors are present:

- “(a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.”

The section provides that persons earning above an amount determined by the Minister of Labour are excluded from the operation of the presumption. According to Benjamin (at 92), this provision was included after organised business expressed concerns that the presumptions would be abused by skilled consultants. Where employees earn equal to or below that amount, they can approach the Commission for Conciliation, Mediation and Arbitration (CCMA) for an advisory award on whether relevant persons are employees. There is also a Code of Good Practice (published as GN 1774 in GG 29445 of 1 December 2006 and available at <http://www.polity.org.za/article/labour-relations-act-code-of-good-practice-who-is-an-employee-notice-1774-of-2006-2007-01-22> (Accessed: 6 February 2015)) on who qualifies as an employee, as required by s 200A (4).

³⁴⁰ ES Fourie. “Non-Standard Workers: The South African Context, International Law and Regulation by the European Union.” (2008) 11(4) *Potchefstroom Electronic Law Journal* 110 at 111 notes that various terms are used to refer to workers who are excluded from labour regulation:

“‘Atypical’, ‘non-standard’, or even ‘marginal’ are terms used to describe these new workers and to refer to those engaged, for instance, in part-time work, contract work, self-employment, temporary, fixed-term, seasonal, casual, piece-rate work, or to employees supplied by employment agencies, home workers and those employed in the informal economy.”

³⁴¹ H Bhorat and H Cheadle. “Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions.” (2009) http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP09-139.pdf 8 (Accessed: 6 February 2015).

employed at lower levels due to a host of material and cultural factors.³⁴³

Concerns about the exclusions from employee status are mediated somewhat by the fact that persons aggrieved by alleged unfair discrimination can invoke the PEPUDA if they fail to establish an employment relationship that falls within the ambit of the EEA. The PEPUDA does offer remedies similar to those available under the EEA.³⁴⁴ However, in the interests of equality we would do well to monitor differences in the remedies awarded in terms of the respective pieces of legislation.

The PEPUDA expressly provides that it does not apply in cases where the EEA applies.³⁴⁵ Sometimes the import of this provision in specific cases may be uncertain. In *Strydom v Chiloane*,³⁴⁶ for example, an employee had racially abused a colleague. The High Court recognised that such conduct could constitute hate speech in terms of the PEPUDA, as well as unfair discrimination in terms of the EEA.³⁴⁷ Hartzenberg J held that in such cases, the more serious breach of the law, which in his view was the racially discriminatory conduct rather than the hate speech, should determine the appropriate forum.³⁴⁸ This line of reasoning is questionable and rests on creating hierarchies of unlawful conduct. Criteria that focus on the

³⁴² The Department of Labour Minimum Standards Directorate. *Policy Proposals for New Employment Standards Statute Green Paper*. (1996) http://www.gov.za/sites/www.gov.za/files/17002_gen156_0.pdf (Accessed: 6 February 2015) at 15-16 explains the plight of atypical, non-standard or marginal workers:

“Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive “social wage” benefits such as medical aid or pension or provident funds.

These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult. Others are excluded and consideration must be given to their inclusion.”

³⁴³ The chairperson of DPSA, in a parliamentary meeting on 6 March 2013, noted that state departments chase the 2% employment target for disabled people, but do not do enough to enhance the employment experience of disabled people, generally employ such persons at entry level and only in certain categories. The minutes of this meeting are available at Parliamentary Monitoring Group. “Disabled People South Africa Briefing on Education, Employment & Accessibility Challenges.” (2013) (hereinafter referred to as “Parliamentary Monitoring Group ‘DPSA Briefing on Education’”) <http://www.pmg.org.za/report/20130306-disabled-people-sa-challenges-faced-people-disabilities-schools-gover> (Accessed: 6 February 2015).

³⁴⁴ Section 21 of PEPUDA.

³⁴⁵ Section 5(3).

³⁴⁶ 2008 (2) SA 247 (T).

³⁴⁷ At para 15.

³⁴⁸ At para 16.

needs of complainants, the suitability of each forum and the remedies that it can provide are arguably more appropriate.³⁴⁹ However, the Court held that even if its reasoning is wrong and there is dual jurisdiction, the Labour Court had exclusive jurisdiction to decide disputes about the application and interpretation of the EEA. The Magistrate in the Equality Court should therefore have referred the dispute to the Labour Court.

The difficulties some employees may encounter in securing access to the Labour Court are alleviated by amendments to the EEA that commenced in August 2014.³⁵⁰ These new provisions allow some parties to refer discrimination cases³⁵¹ in which conciliation has failed to the CCMA for arbitration. These parties are employees who bring cases of sexual harassment, employees who earn below a certain threshold to be determined by the Minister of Labour and any party to a dispute where all the parties agree to arbitration.³⁵²

4.2.3 Discrimination provisions in the EEA

Section 6(1) of the EEA echoes the constitutional prohibition on discrimination and includes a non-exhaustive list of grounds.³⁵³ Unlike the Constitution, it expressly prohibits discrimination on the basis of “any arbitrary ground.” This catch-all ground only started to operate in August 2014 and its potential import will be discussed below.

³⁴⁹ In this regard, section 20(4) of the PEPUDA is instructive. It provides a non-exhaustive list of factors a presiding officer must take into account when deciding whether a matter should be referred to another forum in terms of s 20(3). These factors are:

- “(a) The personal circumstances of the parties and particularly the complainant;
- (b) the physical accessibility of any contemplated alternative forum;
- (c) the needs and wishes of the parties and particularly the complainant;
- (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law;
- (e) the views of the appropriate functionary at any contemplated alternative forum.”

These factors, it is submitted, must be taken into account, regardless of whether there is dual jurisdiction or not.

³⁵⁰ See Employment Equity Amendment Act 47 of 2013.

³⁵¹ This excludes unfair dismissals, which must be dealt with in terms of Chapter VIII of the LRA.

³⁵² Section 10(6) of the EEA.

³⁵³ All the listed grounds in the Constitution are included and the EEA adds three more grounds, namely “HIV status”, “political opinion” and “family responsibility”.

The same amendment that added the 'arbitrary' ground also incorporated an express prohibition of unequal pay for unequal work into the EEA. Section 6(4) now provides: "A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one of the grounds listed in subsection (1), is unfair discrimination." Subsection (5) then gives the Minister of Labour the power to prescribe criteria and the methodology for assessing what constitutes work of equal value after consultation with the CEE. The Minister has published the aforementioned criteria and proposed methodology.³⁵⁴

Section 11 of the EEA contains the amended onus provisions for claims of unfair discrimination. If discrimination is alleged on a listed ground, the employer has to prove that said discrimination "did not take place as alleged" or "is rational and not unfair, or otherwise justifiable". If discrimination is alleged on an arbitrary ground, the employee bears the onus of proving irrationality, discrimination and unfairness.

The EEA gives the Labour Court the power to provide a just and equitable remedy when an employee has been discriminated against unfairly.³⁵⁵ It provides a non-exhaustive list of possible remedies, such as compensation, damages, an order that an employer must take steps to prevent future occurrences of unfair discrimination, an order that a non-designated employer must comply with the EEA affirmative action provisions as if it were a designated employer, an order for the removal of an employer's name from the register of employers who have filed employment equity reports with the Director-General of the Department of Labour and publication of the Court's order.³⁵⁶

³⁵⁴ See South Africa. Department of Labour. *Employment Equity Regulations*. (GN R595 in GG 37873 of 1 August 2014) www.labour.gov.za/DOL/downloads/legislation/regulations/employment-equity/amendment/2014eereglang.pdf (Accessed: 6 February 2015) (hereinafter referred to as "EE Regulations").

³⁵⁵ Section 50(2).

³⁵⁶ Section 50(2)(a)-(f).

4.2.4 Discrimination provisions in the PEPUDA

Section 6 of the PEPUDA prohibits the State or any person from discriminating unfairly against anyone. It is more specific than both the Constitution and the EEA in that it contains sections that deal explicitly with discrimination on the basis of race, gender and disability, respectively.

Section 9 reads:

“[N]o person may unfairly discriminate against any person on the ground of disability, including—

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.”

In contrast to the Constitution and the EEA, the PEPUDA also contains a definition of discrimination.³⁵⁷ Prohibited grounds are defined to include listed grounds such as disability,³⁵⁸ as well as any ground that “causes or perpetuates systemic disadvantage”, “undermines human dignity” or “adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination” on a listed ground.³⁵⁹ The onus provisions³⁶⁰ differ from those contained in s 9(5) of the Constitution and the EEA, because a complainant always has to make out a *prima facie* case of discrimination and if he or she succeeds, the onus then shifts to the respondent to prove fairness.³⁶¹ This approach applies

³⁵⁷ See 4.4.1.

³⁵⁸ The listed grounds in the definition of “prohibited grounds” in s 1 are exactly the same as those in s 9(3) of the Constitution. Section 34 of the PEPUDA states that “[i]n view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status”, serious consideration must be given to include them as listed grounds. It provided for a process to possibly have these grounds included within the listed grounds, but these have not been included yet. However, they may be considered as analogous grounds, provided for in para (b) of the definition of prohibited grounds in s 1.

³⁵⁹ Section 1.

³⁶⁰ Section 13.

³⁶¹ Albertyn, Goldblatt and Roederer 51.

regardless of whether discrimination is on a listed ground or an analogous ground. Apart from the overall burden of proving prima facie discrimination, a complainant who alleges discrimination on a ground that is not listed has to prove that such a ground qualifies as a prohibited ground.³⁶²

Section 14 deals with the determination of fairness. It starts off by providing that measures designed to advance persons or groups who have been discriminated against unfairly do not constitute unfair discrimination. Subsection (2) then states that in determining the fairness of discrimination, attention has to be paid to the context, the factors listed in subsection (3) and “whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned”. The factors listed in subsection (3) are:

- “(a) Whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.”

³⁶² Section 13(2)(b)(i) read with s 1(1)(xxii)(b).

As Langa CJ noted in the *Pillay* case, the factors mentioned in subsection (3) contain factors that constitutional jurisprudence has discussed as part of the unfairness inquiry as well as factors it reserves for the justification inquiry in terms of s 36 of the Constitution.³⁶³ The Court declined to comment on the constitutionality of this approach. O' Regan J, in her dissenting judgment in *Pillay*, lamented the interpretive difficulties occasioned by s 14. In her view, the relationship between the overarching requirement that the differentiation be reasonable and justifiable according to objective criteria intrinsic to the activity at issue (s 14(2)(c)), and the factors listed in subsection (3), is not clear.³⁶⁴ This lack of clarity is unfortunate and may well be constitutionally problematic, but that issue will not receive further attention here.

The PEPUDA makes provision for a wide array of remedies in cases of unfair discrimination, including damages,³⁶⁵ unconditional apologies,³⁶⁶ orders to restrain future breaches or to direct positive steps to stop breaches of the Act,³⁶⁷ orders to reasonably accommodate a group or class of people,³⁶⁸ orders for the implementation of special measures to address contraventions of the Act,³⁶⁹ orders for respondents to conduct audits of specific policies and practices³⁷⁰ and supervisory orders that require respondents to submit progress reports to the court or a relevant constitutional institution.³⁷¹

4.3 Context in the equality 'test'

Before engaging with relevant and potentially challenging contextual factors, I will use this section to discuss where in the 'legal test' for assessing discrimination such factors are considered. The constitutional approach will be discussed first, while the EEA and the PEPUDA equality provisions will be discussed only insofar as these differ from what is provided for in the Constitution.

³⁶³ At para 70.

³⁶⁴ At para 137.

³⁶⁵ Sections 21(2)(d) and 21(2)(e).

³⁶⁶ Section 21(2)(j).

³⁶⁷ Section 21(2)(f).

³⁶⁸ Section 21(2)(i).

³⁶⁹ Section 21(2)(h).

³⁷⁰ Section 21(2)(k).

³⁷¹ Section 21(2)(m).

4.3.1 The 'test' for unfair discrimination

In *IMATU and Another v City of Cape Town*,³⁷² one of the few cases where disability was actively considered as a ground for discrimination, Murphy AJ followed the steps as set out by the Constitutional Court in its equality 'test'. That 'test' was set out as follows in *Harksen v Lane NO and Others*.³⁷³

- “(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

³⁷² (2005) 26 ILJ 1404 (LC).

³⁷³ 1998 (1) SA 300 (CC) para 54. *Harksen* was decided in terms of s 8 of the interim Constitution, but its pronouncements on the equality right remain authoritative and have been endorsed and followed by the Constitutional Court on numerous occasions. Ackermann J, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15, performed an equality analysis on the assumption that the Constitutional Court's jurisprudence and analysis in relation to s 8 of the Interim Constitution is equally applicable to s 9 of the Constitution, even though there are differences in the wording of the respective provisions. See Krüger 479 fn 2 for a list of cases in which the *Harksen* test has been endorsed and applied. The *Harksen* 'test' also forms the basis of the central anti-discrimination provisions in the PEPUA.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

In determining whether the discrimination is fair or unfair, Goldstone J set out the following non-exhaustive list of factors to be considered objectively and cumulatively:

- "(a) The position of the complainants in society and whether they have suffered from patterns of disadvantage in the past;
- (b) The nature of the provision or power that discriminates and the purpose it seeks to achieve; and
- (c) With due regard to the aforementioned factors and any other relevant factor, the "extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature."³⁷⁴

From the above, contextual factors are expressly foreseen to find application in three phases. The first instance is where the differentiation is not on a specified ground and the factfinder has to determine whether it is based on attributes or characteristics that could potentially harm the fundamental human dignity of the complainant or cause harm of a comparably serious nature. The second instance is when determining whether the discrimination is fair or unfair. The third instance is when there has been a finding of unfairness and the inquiry turns to whether such unfair discrimination could nevertheless be justifiable in terms of s 36 of the Constitution.³⁷⁵

³⁷⁴ At para 52.

³⁷⁵ In *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 77, Kriegler J distinguished between the justification inquiry and the fairness inquiry: "[F]actors that would or could justify interference with the right to equality [...] are to be distinguished from those relevant to the [fairness enquiry]. The one is concerned with justification, possibly notwithstanding unfairness; the other is concerned with fairness and with nothing else."

Some commentators have discussed the duplication of factors in the various phases of the *Harksen* ‘test’ and different opinions exist as to whether the unfairness and justification inquiries ought to be separate and distinct.³⁷⁶ Both the EEA and the PEPUDA collapse those inquiries. As noted above,³⁷⁷ the factors to be considered in determining fairness in the PEPUDA include factors that, in terms of prior constitutional jurisprudence, would only be considered in the justification inquiry. Similarly, as Murphy AJ pointed out in *IMATU*, the EEA fairness inquiry may also include the consideration of factors that in jurisprudence on s 9 of the Constitution have been considered in the justification stage.³⁷⁸ He further noted that s 6(2)(b) of the EEA contains the most important defence to a claim for unfair discrimination in the employment context, namely that it is based on an inherent requirement of the job.

4.3.2 The use of the *Harksen* ‘test’ in labour jurisprudence

The Labour Appeal Court in the *Mias* case³⁷⁹ set out the general approach to unfair discrimination in terms of the EEA succinctly: “Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly?” This dictum has not been applied consistently.

³⁷⁶ Krüger (at 489) argues that in a complaint based on an analogous ground, the impact of the discrimination on the complainant is considered when determining whether there is discrimination and again when deciding whether such discrimination is unfair (the first and second instances mentioned here). Most commentators have expressed the view that the unfairness and justification inquiries (the second and third instances here) are separate and serve different functions, but acknowledge the overlap in factors to be considered in each phase (see, e.g. IM Rautenbach. “Die Verband Tussen die Gelykheidsbepaling en die Algemene Beperkingsbepaling in die Handves van Regte.” (1997) *Tydskrif vir die Suid-Afrikaanse Reg* 571 at 575-580; C Albertyn and J Kentridge. “Introducing the Right to Equality in the Interim Constitution.” (1994) 10 *South African Journal on Human Rights* 149 at 175-176; JD van der Vyver. “Gelykberegtiging.” (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 367). Krüger, however, argues that the inquiry into the fairness of the discrimination and the assessment of the reasonableness of unfair discrimination in terms of s 36 (where s 36 is applicable) essentially requires consideration of similar factors, that the Constitutional Court has not engaged in a meaningful justification inquiry in unfair discrimination cases and that practically it would be better to collapse these two phases of the *Harksen* ‘test’ into what she terms a ‘fairness-cum-justification analysis’ (at 503-505).

³⁷⁷ See fn 363 and accompanying text.

³⁷⁸ At para 100.

³⁷⁹ *Mias v Minister of Justice and Others* [2002] 1 BLLR 1 (LAC) para 21.

Darcy Du Toit³⁸⁰ has expressed the view that the *Harksen* framework leaves too much leeway to employers, who should be held to different standards than organs of state acting in a non-employment context.³⁸¹ He argues that allowing for the possibility that discrimination (which is pejorative) on prohibited grounds may be fair “must blunt the purpose of the very constitutional clause which is purportedly being applied.”³⁸² His justification for this assertion is that in the employment context “it may still seem natural to many that certain categories of people – such as black people, or women, or young people, or people with disabilities – cannot reasonably be appointed to certain positions which they have never occupied or entrusted with certain responsibilities which they have never exercised.”³⁸³ Such exclusions may be permissible based on inherent requirements of the job, but in a context of pervasive, systemic discrimination, an open-ended notion of fair discrimination is, in his view, dangerous.³⁸⁴

A more technical strand of Du Toit’s reasoning is that the *Harksen* ‘test’ was developed before the EEA came into effect. With the advent of the EEA, cases of discrimination that fall within its ambit have to be decided within the four corners of that Act. The EEA expressly requires that it be interpreted in compliance with the ILO Convention 111 of 1958 on Discrimination (Employment and Occupation).³⁸⁵

The cumulative effect of Du Toit’s reasoning has implications for how we think about discrimination as well as our assessments of whether discrimination is fair. In his

³⁸⁰ D Du Toit. “Protection against Unfair Discrimination in the Workplace: Are the Courts Getting It Right?” (2007) *Law, Democracy and Development (Special Issue)* (hereinafter referred to as “Du Toit ‘Protection against Unfair Discrimination’”) 1; D Du Toit. “The Evolution of the Concept of ‘Unfair Discrimination’ in South African Labour Law.” (2006) 27 *Industrial Law Journal* 1311; D Du Toit. The Prohibition of Unfair Discrimination: Applying Section 3(d) of the Employment Equity Act 55 of 1998. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) (hereinafter referred to as “Du Toit ‘Applying s 3(d) of the EEA’”) 139; D Du Toit. “Submission on Employment Equity Amendment Bill of 2012.” (7 August 2013). <http://www.pmg.org.za/report/20130807-employment-equity-amendment-bill-employment-services-bill-public-hearings-day-1> (Accessed: 6 February 2015) (hereinafter referred to as “Du Toit ‘Submission to Parliament’”).

³⁸¹ Du Toit ‘Protection against Unfair Discrimination’ 1-2.

³⁸² Du Toit ‘Applying s 3(d) of the EEA’ 140.

³⁸³ Du Toit ‘Applying s 3(d) of the EEA’ 141.

³⁸⁴ Ibid.

³⁸⁵ Section 3(d) reads: “This Act must be interpreted in compliance with the international law obligations of the Republic in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.”

view,³⁸⁶ any interpretation of 'discrimination' in terms of the EEA must be consistent with the definition of 'discrimination' in Convention 111. Furthermore, he argues that the only defences to claims of unequal treatment on listed or unlisted grounds will be affirmative action measures, the inherent requirements of the relevant job and any measures taken against a person suspected of, or who is engaging in, "activities prejudicial to the security of the State."³⁸⁷ In the absence of those defences an employer, in order to escape censure, must prove that the treatment in question amounts to mere differentiation and not discrimination, or was based on a legitimate or permissible ground. In terms of this approach, a general defence of 'fairness' will not be open to employers.³⁸⁸

Du Toit's arguments were presented at the National Economic Development and Labour Council (NEDLAC) and when the 2014 amendments to the EEA were discussed in Parliament, but were ultimately rejected. The Department of Labour's response was that the NEDLAC parties had purposely decided not to have a definition of discrimination because a definition may unintentionally decrease the scope of discrimination and work to the detriment of vulnerable workers.³⁸⁹ It also left the open-ended fairness defence intact. I will not express firm opinions on these issues here. Instead, I will be pragmatic in my approach by accepting that the open-ended fairness standard will persist, particularly in light of the fact that the fairness and justification inquiries have been collapsed in the EEA and the PEPUDA. However, du Toit's warning that the interpretation and application of contextual factors used to assess the fairness of or justifications for discrimination may work to the detriment of vulnerable workers will influence the discussion of context.

³⁸⁶ Du Toit 'Protection against Unfair Discrimination' 6-7.

³⁸⁷ See articles 4 and 5 of Convention 111.

³⁸⁸ Du Toit 'Applying s 3(d) of the EEA' (at 156) argues that the word 'unfair' in s 6(1) of the EEA is technical rather than substantive. It is meant to identify the prohibited activity, not to postulate a standard for assessing its lawfulness or unlawfulness. Hepple 'Can Discrimination be Fair?' at 2-3 agrees with Du Toit's views and argues that a standard of proportionality to assess the fairness of or justifications for discrimination is preferable to a vague and open-ended fairness standard.

³⁸⁹ Parliamentary Monitoring Group. "Employment Services Bill; Employment Equity Amendment Bill: Department Response to Public Submissions." (20 August 2013) <http://www.pmg.org.za/report/20130820-employment-services-bill-employment-equity-amendment-bill-department-response-public-submissions> (Accessed: 6 February 2015).

On the assumption that an open-ended fairness standard will persist, let us turn our attention to the role of context in the equality ‘test’, as applied in the constitutional and labour jurisprudence on unfair discrimination. Once again, we are less concerned here with the jurisprudential utility of the test³⁹⁰ than with how context is implicated in the conceptualisation of disability and disadvantage. Also, ‘context’ is used broadly to refer to historical, social and environmental factors that impact on the present-day realities of disabled people and the communities in which they live or to which they want to gain access.

4.3.3 Context in defining the protected class: A jurisprudential gap

Are there phases of the equality ‘test’ that ought to be more sensitive to context? Saras Jagwanth, in a critique of the Constitutional Court’s decision in *City Council of Pretoria v Walker*,³⁹¹ has argued that the way in which the Constitutional Court deals with categorisation and difference in the second stage of the equality analysis – that is, the consideration of whether discrimination is found to have occurred – means that historical disadvantage is overlooked at that stage.³⁹² In *Walker*, the Constitutional Court reasoned from the premise that township residents are still predominantly Black and that the residents of historically White municipalities are still predominantly White and therefore accepted that a differentiation on the basis of geography amounted to discrimination on the basis of race.³⁹³

Sachs J, in his dissenting judgment, opined that where differentiation is direct, South Africa’s history of institutionalised racism and sexism dictates that it be treated as prima facie discrimination, which then triggers the presumption of unfairness.³⁹⁴ In terms of this approach, a complainant would not be required to show prejudice, as

³⁹⁰ Arguments that the dignity standard can be refined to provide better justifications for courts’ reasoning (see, e.g. Krüger 479; S Cowen. “Can ‘Dignity’ Guide South Africa’s Equality Jurisprudence?” (2001) 17 *South African Journal on Human Rights* 34) exist, but so do arguments that a better understanding of dignity will not necessarily provide adequate justifications for courts’ decisions (see, e.g. McConnachie 609). These debates on the utility of dignity to explain courts’ reasoning is related to, but distinct, from debates as to whether it ought to be the only value that underpins the right to equality.

³⁹¹ 1998 (2) SA 363 (CC).

³⁹² S Jagwanth. “What is the Difference? Group Categorisation in *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).” (1999) 15 *South African Journal on Human Rights* 200.

³⁹³ Per Langa CJ at para 32.

³⁹⁴ *City Council of Pretoria v Walker* para 107.

any classification based on prohibited grounds raises the spectre of potential prejudice. Where discrimination is indirect, though, Sachs J was of the view that a complainant would have to lead evidence of adverse impact.³⁹⁵ For him, “[t]he mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not [...] enough to constitute indirect discrimination on the grounds of race.”³⁹⁶

Jagwanth does not agree with the different approach to direct and indirect discrimination, respectively, advocated by Sachs J. She argues that the protected grounds are stated in neutral terms such as ‘race’ or ‘gender’, but that the protection is targeted at marginalised races and genders.³⁹⁷ In her view, therefore, the Court’s mechanical, decontextualised approach to identifying the protected class allows someone belonging to a privileged race or gender to benefit unduly from two presumptions, namely that differentiation is automatically assumed to be discriminatory and that it is unfair. Jagwanth finds such an approach to be incongruous with the equality right’s central purpose, which, in her opinion, is to redress historical disadvantage.³⁹⁸

Albertyn and Goldblatt recognise that prejudice suffered by the group within which the complainant falls should ideally have been considered at the first stage, but argue that the unfairness stage will necessitate consideration of the contextual factors Jagwanth wants a court to consider when it decides whether differentiation amounts to discrimination.³⁹⁹ In the end, so their argument goes, the analysis as a whole does give effect to the central purposes of substantive equality. Furthermore, they suggest that it may be advantageous to make it easier for people to pass the first stage before weeding out undeserving claims at the unfairness stage.⁴⁰⁰

In essence, there are two advantages a complainant from a privileged race or

³⁹⁵ At para 107 he stated: “[I]n the case of differential impact of an indirect nature I feel that there is no scope for any such per se assumption of discrimination, and that some element of prejudice, whether of a material kind or to self-esteem, has to be established. Only then can it be said that “prima facie proof of discrimination” on one of the specified grounds exists [...]”

³⁹⁶ At para 105.

³⁹⁷ Jagwanth 205.

³⁹⁸ Jagwanth 200.

³⁹⁹ C Albertyn and B Goldblatt. Equality. In: S Woolman and M Bishop (eds). *Constitutional Law of South Africa*. (2007) (hereinafter referred to as “Albertyn and Goldblatt ‘CLOSA’”) Item 35.5.

⁴⁰⁰ Ibid.

gender would have over someone who claims differentiation on an analogous ground. Firstly, discrimination is assumed. Secondly, the complainant would not bear the onus of proving the unfairness of such discrimination. The second advantage is diluted by the fact that the overall inquiry is focused on the effect of discrimination on complainants, regardless of where the burden of proof falls. A perusal of case law also shows that some claimants have succeeded in their claims even if they were not able or required to show that discrimination against them has been on a listed ground.⁴⁰¹ However, judicial acknowledgement that claimants are part of a historically marginalised group is important for reasons other than its potential impact on the case at hand. This is especially significant when one considers that the most prevalent ideas about disability fail to regard it as a form of social oppression in the same way as, for example, racism and sexism.

The first advantage, namely the assumption that discrimination has occurred, may also have consequences beyond its immediate impact on the case. The judicial understanding of 'discrimination' is pejorative.⁴⁰² The recognition of specified grounds flows from the acknowledgement that certain groups have been marginalised. In my view, therefore, the operation of an assumption of discrimination in favour of persons who fall within a historically privileged group has consequences for the recognition aspect of substantive equality,⁴⁰³ regardless of whether it affects a complainant's prospects of success or not. It obscures the reasons for protecting certain groups and creates a false equivalence between dominant and marginalised.⁴⁰⁴ Such an approach also sits uncomfortably with understandings of rights as primarily being concerned with the regulation of relationships of power.⁴⁰⁵

⁴⁰¹ See, for example, *IMATU and Another v City of Cape Town* (2005) 26 ILJ 1404 (LC), *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

⁴⁰² In *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) (at para 31), Ackermann J, O'Regan J and Sachs J stated: "Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them."

⁴⁰³ This aspect is discussed more extensively in 4.5.

⁴⁰⁴ As Jagwanth argues (at 204), it ignores "that difference is very rarely about mere distinctions, but inequalities of power."

⁴⁰⁵ M Minow. *Making All the Difference: Inclusion, Exclusion, and American Law*. (1990) (hereinafter referred to as "Minow 'Making All the Difference'") 15 argues for "a shift in the paradigm we use to conceive of difference, a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions." She therefore sees an approach of "embedding rights within relationships" as a more promising alternative than dismissing rights altogether or viewing them only as means through which to protect individual autonomy.

Institutionalised racism and sexism operated to oppress Black people and women, so it is incongruous that White people and men, who are generally privileged within race and sex categorisations, should, without more, benefit from presumptions that are justified by recourse to a decontextualised historical narrative. Having said that, there are dangers inherent in treating all the protected grounds in the same manner. Race as a protected ground in the South African context is complicated by the fact that while economically White people as a group still hold enormous structural power, they are a political minority.⁴⁰⁶ The same cannot be said for men or enabled persons.

Even if one accepts that race or sex classifications inherently raise suspicions of discrimination, it does not follow that the appropriate response is to hold that discrimination is established if differentiation takes place on listed grounds. A better approach, in my view, would be to require all complainants to prove *prima facie* discrimination without the aid of a presumption and to invoke contextual factors that will make it easier for complainants who belong to groups who have suffered systemic disadvantage or who are vulnerable in the present and in relevant contexts, to establish prejudice. This is the approach that would be taken in terms of the PEPUDA and, it is submitted, it is the more appropriate one for purposes of the EEA.

A related reason why a context-sensitive approach to the first stage of the unfair discrimination inquiry is necessary is that the different stages of the inquiry are not unrelated.⁴⁰⁷ One example is that there may be a negative correlation between conceptions of disability as individual deficit and the likelihood that employers are found to have acted unfairly or, where relevant, the likelihood that unfair discrimination is found to be justifiable. In my view, therefore, Albertyn and Goldblatt's response to Jagwanth that the other stages of the *Harksen* inquiry can

⁴⁰⁶ The Constitutional Court recognised this reality in *Walker* when Langa DP noted (at paras 47-48):
"The respondent belongs to a group that has not been disadvantaged by the racial policies and practices of the past. In an economic sense, his group is neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past. [...] The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected."

⁴⁰⁷ Jagwanth 204.

remedy the decontextualised identification of a protected class is unsatisfactory, at least in the context of disability. It ignores the political and analytical relevance of contextually grounded identifications of protected groups, as well as the interrelationship between the various stages of the unfair discrimination inquiry.

As will be discussed more fully below,⁴⁰⁸ disability is different from protected grounds such as gender and race in that classification as disabled is often central to disabled people's oppression. As Paul Abberley notes, "[w]hile in the cases of sexual and racial oppression, biological difference serves only as a qualificatory condition of a wholly ideological oppression, for disabled people the biological difference, albeit [...] itself a consequence of social practices, is itself a part of the oppression."⁴⁰⁹ Definitions of disability that portray impairment solely as an objectively determinable, biomedical fact – and I will argue that the EEA definition falls into that category – are part of a grand narrative that leaves unquestioned the ways in which societal norms oppress disabled people.

Failures to contextualise the protected ground of disability create the spectre that, in order to receive protection from social oppression, one has to first satisfy oppressive definitions of disability that ignore that oppression. It is important that we consider why this contradiction persists and how our thinking about social causes of disability, the nature of rights and legal processes, substantive equality and non-discrimination, and the social and economic role of employment may have to shift in order to develop a coherent, consistent approach to create and sustain more opportunities for disabled people to access work.

4.3.4 Symmetrical or asymmetrical approach to disability?

Even though disability appears to differ from race and gender in that it directly references a marginalised social status, some have argued that enabled persons should be able to claim that they have been discriminated against on the basis that they are not disabled. A literal reading of the Constitution, the EEA and the

⁴⁰⁸ See 4.4.4.

⁴⁰⁹ Abberley 'Concept of Oppression' 8.

PEPUDA makes such a reading possible. These provisions prohibit discrimination “on one or more grounds”,⁴¹⁰ including disability or “on the ground of disability.”⁴¹¹

The European Union Employment Equality Directive uses similar wording in that it seeks to combat “discrimination on the grounds of [...] disability [...] as regards employment and occupation.”⁴¹² Commentators have differed on whether this implies a symmetrical or asymmetrical approach to disability. Skidmore is of the view that, unlike race and gender, it is “only discrimination on grounds of disability and not ‘non-disability’ that is prevented by the Directive.”⁴¹³ Waddington, on the other hand, argues that the Directive can be interpreted as embracing a symmetrical approach in that it protects individuals from discrimination “on the grounds that they are disabled as well as discrimination on the grounds that they are not disabled.”⁴¹⁴

An asymmetric approach is more protective of disabled persons’ rights, as it would prevent enabled persons from challenging positive action that seeks to advance disabled people.⁴¹⁵ Positive measures that constitute valid restitutionary measures do not constitute unfair discrimination in South African law. This means that a symmetrical approach is not likely to stymie affirmative action measures that seek to advance disabled people. However, there is a possibility that reasonable accommodation measures or other forms of positive action that are not targeted at advancing disabled people as a class may be challenged on the basis that these disadvantage enabled persons.

⁴¹⁰ Section 9(3) of the Constitution and s 6(1) of the EEA.

⁴¹¹ Section 9 of the PEPUDA.

⁴¹² Council of the European Union. “Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation.” (2000) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> (Accessed: 6 February 2015) Article 1.

⁴¹³ P Skidmore. “European Development. EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?” (2001) 30(1) *Industrial Law Journal* 126 at 131.

⁴¹⁴ L Waddington. Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion. In: A Lawson and C Gooding (eds). *Disability Rights in Europe. From Theory to Practice*. (2005) as quoted in D Schiek, L Waddington and M Bell (eds). *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. (2007) 130.

⁴¹⁵ Schiek, Waddington and Bell 131.

If the protected class is identified in a mechanical, decontextualised manner, as was employed in *Walker*, a symmetrical approach could result in an enabled person who challenges a reasonable accommodation measure receiving the benefit of having discrimination presumed because the differentiation is on the listed ground of disability. Such a complainant would also be assisted by a presumption that the discrimination was unfair.

As was argued above, such an approach is incongruous with a substantive approach to equality that emphasises the adverse consequences of categorisation, as opposed to viewing categorisation itself as inherently negative. Even if this argument is not accepted – and there are good arguments for why it should not be accepted, perhaps more so on some grounds than others – an appropriate balance would be to require all complainants to show prejudice in order to prove discrimination. If some relevant contextual factors are then considered at this stage, it would make it easier for disabled persons than for enabled persons to show adverse impact. It will also require engagement with why complainants are protected, which hopefully will lead to a more contextually grounded unfairness inquiry.

4.4 Disability discrimination and disadvantage

I have noted that discrimination is regarded as pejorative because it impairs the fundamental human dignity of complainants. However, this is a vague description and does not offer much insight into the disadvantage that is to be prevented or remedied. Disadvantage is implicated in two related, yet distinct ways in unfair discrimination claims. Firstly, a complainant has to show that differentiation has had some adverse impact on her fundamental human dignity. Secondly, the contextual inquiry as to whether someone falls within the protected class of disability requires an examination of her position in society, whether she belongs to a group that has suffered systemic discrimination and the impact of the discrimination on her fundamental human dignity. The first inquiry into disadvantage relates to the immediate consequences of the impugned differentiation. The second inquiry is

further removed from the differentiation at issue and attempts to situate the complainant within social structures and power relations.

It is important that we examine how the non-discrimination provisions construct the relationship between disability and disadvantage. The first component of this inquiry implicates decisions on whether there is immediate disadvantage that flows from a complainant being a member of a protected class. We therefore have to consider whether there is a causal link between a protected ground and the differentiation, as well as whether the complainant falls within one or more protected grounds.

The second component of how the link between disability and disadvantage is constructed is how complainants' and disabled persons' positions in society are interpreted and how those interpretations influence outcomes. The social positioning of complainants is an important component in the analysis of whether discrimination is unfair.

4.4.1 Determination of discrimination

The Constitution and the EEA do not define discrimination, but the PEPUDA does. Given that both the EEA and the PEPUDA seek to give effect to the right to equality in the Constitution, it is arguable that, unless compelling reasons are advanced for interpreting discrimination differently under the two Acts, the definition in the PEPUDA can be of assistance in defining discrimination under the EEA.⁴¹⁶ This is so despite the fact that the legislature chose not to include a definition of discrimination when the EEA was amended in 2013.

The PEPUDA defines discrimination as

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from,

⁴¹⁶ Someone who is disadvantaged by the approach to discrimination in the EEA because it is less favourable than the approach in the PEPUDA could allege that the difference is an infringement of her right to equal protection and benefit of the law.

any person on one or more of the prohibited grounds”.⁴¹⁷

One of the differences between having a definition of discrimination and the approach adopted in *Harksen* is that there is no presumption of discrimination if differentiation is on a listed ground. Complainants have to make out a prima facie case of discrimination as defined. The conception of discrimination is therefore not one that focuses on different treatment, but on whether differentiation has resulted in harm or prejudice.⁴¹⁸ This approach is arguably different from that followed in *Walker*, where different treatment on the grounds of race was held to constitute discrimination without the complainant having to prove actual prejudice. As argued above, this approach is questionable for the purposes of disability.

Disabled work seekers will have to show that the differentiation they are challenging has imposed a burden, obligation or disadvantage or has withheld a benefit, opportunity or advantage. For present purposes, let us focus on the withholding of a work opportunity. In most instances, it would not be too difficult for a complainant who is not appointed to prove such non-appointment. However, she will also bear the onus of proving the link between the differentiation and on one or more of the prohibited grounds.⁴¹⁹ This is a difficult burden to discharge when most of the information necessary to sustain such a claim will be within the peculiar knowledge of the prospective employer.

Dupper and Garbers explain that complainants will often have to rely on circumstantial evidence that may not be readily available or may be of questionable quality.⁴²⁰ In *Woolworths (Pty) Ltd v Whitehead*,⁴²¹ for example, Ms Whitehead alleged that she had received a job offer from Woolworths and that it was retracted

⁴¹⁷ Section 1.

⁴¹⁸ Albertyn, Goldblatt and Roederer 32.

⁴¹⁹ See C Garbers. The Prohibition of Discrimination in Employment: Performance and Prognosis in a Transformative Context. In: Malherbe, K and Sloth-Nielsen, J (eds). *Labour Law into the Future: Essays in Honour of D'Arcy du Toit*. (2012) 18 at 21. OC Dupper and C Garbers. Employment Discrimination: A Commentary. In: C Thompson and P Benjamin (eds). *Labour Law*. (2002) CC1 (hereinafter referred to as “Dupper and Garbers ‘Employment Discrimination’”) at CC1-28 write: “The need to show the link between the differentiation and the listed ground in order to establish discrimination sounds like a deceptively simple exercise. However, it needs to be pointed out that in practice, it has proved to be one of the most difficult hurdles for applicants to cross.”

⁴²⁰ Dupper and Garbers ‘Employment Discrimination’ CC1-84.

⁴²¹ (2000) 21 ILJ 571 (LAC).

after she disclosed her pregnancy. The differing factual conclusions reached by judges, in the Labour Appeal Court, illustrate the difficulty in proving that a decision not to hire a person was related to a prohibited ground.⁴²²

4.4.2 Direct and indirect discrimination

The prohibitions on discrimination in the Constitution, the EEA and the PEPUDA all include both direct and indirect discrimination.⁴²³ The distinction between direct and indirect discrimination is relevant because the nature of the link between the impugned differentiation and the complainant's resultant disadvantage differs. In *Police and Prison Rights Union and Others v Department of Correctional Services and Another*, the Court distinguished between the two forms of discrimination:

“Direct discrimination refers to situations in which some people are treated differently from others on the basis of their race, sex, religion or other protected trait. Indirect discrimination on the other hand occurs when an employer utilises an employment practice that is apparently neutral, but disproportionately affects members of disadvantaged groups in circumstances where it is not justifiable.”⁴²⁴

⁴²² Zondo AJP held (at para 24) that Ms Whitehead was unable to prove a causal connection between her non-appointment and her pregnancy. This was because she was not able to show that, “but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself.” Conradie JA (at paras 42-43, 48-50) found that Woolworths had not adduced sufficient evidence to show that continuity of employment for at least 12 months was in fact an inherent requirement of the job. The only reasonable inference therefore was that Ms Whitehead's pregnancy was the reason for her non-appointment. Willis JA held (at para 76): “It is impossible, in my view, *ex post facto*, to unscramble the events and determine, within a comfortable margin of certainty, whether but for the fact of her pregnancy, the applicant would have secured the permanent position.” After considering the evidence, he concluded (at para 133):

“The dominant impression is that the decision of the employer was influenced not so much by the pregnancy of the employee *per se* but rather by a range of factors which it could legitimately take into account, including her unavailability. The dominant impression is thus not one of an employer averse to pregnant women being employed by it. It is also not one of an employer that unreasonably seeks to avoid the employment of pregnant women. It is clear that the employee's pregnancy was not the sole reason for her not being offered the permanent position.”

⁴²³ *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 30; *National Coalition for Gay and Lesbian Equality v Minister of Justice* at para 63.

⁴²⁴ *Police and Prison Rights Union and Others v Department of Correctional Services and Another* (2010) 31 ILJ 2433 (LC) para 123.

Dupper and Garbers⁴²⁵ note that there may be various reasons why employers would make direct discrimination public – they “may be comfortable” in their bigotry; they may feel that they are acting in the best interests of the people they are discriminating against; the discrimination may be based on an ingrained stereotype accepted as common knowledge; employers may rely on the prejudices of fellow employees in justifying their conduct as inevitable; employers may be discriminating openly, but feel that they are doing so on a neutral basis or for a laudable purpose; and employers “may simply be caught by the times”.

Stereotyping and stigmatisation of disabled people mean that it is possible that discrimination against such persons may not be regarded by employers as problematic. Ironically, the pervasiveness of prejudice makes it easier for complainants to present direct evidence that the discrimination is based on a disability. If no such direct evidence exists, a complainant has to lead circumstantial evidence that leads to the conclusion that the discrimination was based on his or her disability, which in many cases is difficult to do successfully.⁴²⁶

Indirect discrimination occurs where apparently neutral requirements, policies or practices “operate to ‘freeze’ the status quo of prior discriminatory practices.”⁴²⁷ Fredman argues that the multiplicity of definitions of indirect discrimination in the European Community and United Kingdom (UK) laws reveal “a deep-seated set of ambiguities in the concept.”⁴²⁸ She then goes on to identify three classes of indirect discrimination.⁴²⁹ The first class focuses on the effect of a measure on an individual rather than on the group to which the individual belongs. This approach negates the need for complex statistical evidence to show disproportionate impact on particular groups; all that has to be shown is that the individual is adversely affected because of his or her belonging to a group. However, it has been criticised for stressing

⁴²⁵ OC Dupper and C Garbers. The Prohibition of Unfair Discrimination. In: E Strydom (ed). *Essential Employment Discrimination Law*. (2004) 31 (hereinafter referred to as “Dupper and Garbers ‘Prohibition of Unfair Discrimination’”) at 42.

⁴²⁶ Dupper and Garbers ‘Prohibition of Unfair Discrimination’ 42-43.

⁴²⁷ Dupper and Garbers ‘Prohibition of Unfair Discrimination’ 44.

⁴²⁸ S Fredman. “Equality: A New Generation?” (2001) 30(2) *Industrial Law Journal* 145 (hereinafter referred to as “Fredman ‘New Generation’”) at 161.

⁴²⁹ Fredman ‘New Generation’ 161-162.

formal equality and for blurring the line between direct and indirect discrimination.⁴³⁰

The second approach Fredman identifies is one in which group disadvantage has to be established. If this is established, discrimination is assumed unless the respondent can justify it with reference to non-discriminatory measures. If the measure is justified, the disproportionate impact on the disadvantaged group will be allowed to continue. The third approach is similar to the second, except that there is no justification defence. The emphasis is squarely on equality of results.

The South African approach to indirect discrimination seems to fall into the second category in Fredman's classification. Courts have not required complex statistical evidence to show impact on a group. In *Leonard Dingler*, the Labour Court held that where only 8 out of 50 Black employees were paid on a monthly basis, the restriction of staff benefit to employees who received monthly remuneration constituted indirect discrimination.⁴³¹ Dupper and Garbers argue that while this "cavalier attitude" may work in obvious cases and a robust approach to numbers may help in other cases, sophisticated statistical evidence may be required to prove more subtle forms of indirect discrimination.⁴³²

4.4.3 Indirect discrimination on the grounds of disability

On the face of it, indirect discrimination may appear to be less important for disability because complainants would find it easier to challenge an employer on the basis that there has been a failure to make reasonable accommodation. Where the latter approach is taken, complainants will not have to prove that there has been a disproportionate impact on a group, but merely that differentiation imposes burdens or withholds advantages from them.

Another important difference is that reasonable accommodation has to be tailored to particular disabled people, whereas indirect discrimination concerns impact on a group of persons and would therefore require generally applicable adjustments to

⁴³⁰ Lawson 163.

⁴³¹ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC) at 293 per Seady AJ.

⁴³² Dupper and Garbers 'Prohibition of Unfair Discrimination' 48.

work environments or work processes. While this aspect means that it may be easier to claim reasonable accommodation, the fact that a successful claim for indirect discrimination could result in remedies that address deeper structural impediments may make it a strategically attractive option for those who litigate in the public interest or on behalf of DPOs. As will be discussed in the next chapter, s 5 of the EEA, which provides for positive non-discrimination duties, may be of particular relevance.⁴³³

Garbers⁴³⁴ argues that indirect discrimination claims are not pursued often because the concept is poorly understood by the people who matter, because such claims are difficult and time-consuming to litigate and because statistical evidence is required to prove disproportionate impact. Furthermore, he argues that in a context where strong affirmative action measures are sanctioned, the potentially transformative prohibition on indirect discrimination assumes a less important role. Given these factors, he foresees that indirect discrimination is likely to be used on an ad hoc basis in cases where disproportionate impact is relatively obvious. Even if this prediction proves accurate, there is still potential for disabled people to challenge indirect discrimination, especially when one considers that there is limited scope for aggrieved individuals to challenge failures to ensure affirmative action through litigation.⁴³⁵

In *Singh v Minister of Justice and Constitutional Development and Others*,⁴³⁶ the complainant had not been shortlisted for several positions as a magistrate. One of the issues that had not been fully traversed in argument was that the advertisement for the posts had stated as one of the requirements a valid driver's licence.⁴³⁷ Ms Singh, due to her visual impairment, could not obtain a driver's licence.⁴³⁸ Ledwaba J did not pronounce on this matter, but if one were to apply the second formulation of indirect discrimination, as discussed above, the issue would be whether the requirement that applicants possessed a valid driver's licence impacted

⁴³³ See 5.3.1.

⁴³⁴ Garbers 26-27.

⁴³⁵ See 5.3.3.3.

⁴³⁶ 2013 (3) SA 66 (EqC).

⁴³⁷ Interestingly, this requirement was absent at the shortlisting and interview stages of the selection process – see para 16.

⁴³⁸ Para 17.

disproportionately on a group of persons.

An important issue would be whether the relevant group encompasses blind or visually impaired people only or whether it should include all disabled people who are unable to obtain a driver's licence due to their disability. How the relevant group is circumscribed is relevant in the assessment of disproportionate impact, because if the group is defined more broadly, such assessment is likely to be more favourable to complainants.⁴³⁹ Given that disability encompasses varied conditions in interaction with diverse environments, it is arguable that disproportionate impact should be assessed in relation to persons who share the same disability, as is required by the British Equality Act.⁴⁴⁰

Even within such a requirement, there is scope to interpret "the same disability" broadly or narrowly. An example would be where a job applicant stutters and is required to deliver an oral presentation as part of the interview process, even though the relevant job does not require oral presentation skills.⁴⁴¹ The group on which the disproportionate impact is to be assessed could either be defined broadly as persons with speech impairments or narrowly as people who stutter.⁴⁴² South African courts have followed a flexible approach to indirect discrimination and it is submitted that the identification of the relevant group has to be made on a case-by-case basis, bearing in mind that the ultimate purpose of indirect discrimination is to remedy structural barriers that have been rendered invisible by prior practice.

If seemingly neutral differentiation does have a disproportionate impact, the second issue is whether it is objectively justifiable.⁴⁴³ A court is required to assess whether there is a legitimate purpose and whether the means chosen to effect such purpose are rational and proportionate. A laudable motive or the absence of malice is not a

⁴³⁹ The cases in which indirect discrimination have been alleged have mostly focused on race – see, e.g. *City Council of Pretoria v Walker*, *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others*, *SADTU obo Makua v Mpumalanga Education Department* [1999] 5 BALR 638 (IMSSA).

⁴⁴⁰ Section 6(3)(b).

⁴⁴¹ See A Tyrer. "Indirect Discrimination." (2012)

<http://www.stammeringlaw.org.uk/discrimination/indirect.htm> (Accessed: 6 February 2015).

⁴⁴² Ibid.

⁴⁴³ *Leonard Dingler* 293C-D.

valid justification,⁴⁴⁴ even though some cases have erroneously ignored this principle.⁴⁴⁵

4.4.4 The prohibited ground of disability

The ambit of the prohibited ground of disability is an important indicator of the extent to which social understandings of disability permeate operational legislative provisions. Space constraints prevent an extensive analysis of each of the eligibility requirements for disability. These analyses have been conducted by other commentators.⁴⁴⁶ However, I will briefly set out the basic legal provisions and then highlight selected aspects of how these provisions give expression to, as well as inhibit the realisation of, the normative commitments engendered by social understandings of disability and an emphasis on substantive equality.

The Constitution and the PEPUDA do not contain definitions of disability. The EEA defines “people with disabilities” as “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.”⁴⁴⁷ Certain forms of impairments are expressly excluded from the ambit of disability. These include, but are not limited to, the following:

“sexual behaviour disorders that are against public policy; self-imposed body adornments such as tattoos or body piercing; compulsive gambling, tendency

⁴⁴⁴ *Leonard Dingler* 293G. See, also, *City Council of Pretoria v Walker* para 43 in which Langa DP (as he then was) stated that proof of intention to discriminate is not a threshold requirement for either direct or indirect discrimination.

⁴⁴⁵ See MJ Moifo. *Indirect Discrimination in the Workplace: A Comparison between South Africa and the United States of America*. (2012) 32-40 for a brief discussion of the most relevant cases.

⁴⁴⁶ See, inter alia, C Ngweni. “Deconstructing the Definition of ‘Disability’ Under the Employment Equity Act: Social Deconstruction.” (2006) 22 *South African Journal on Human Rights* 613; C Ngweni. “Deconstructing the Definition of ‘Disability’ Under the Employment Equity Act: Part II (Legal Deconstruction).” (2007) 23 *South African Journal on Human Rights* (hereinafter referred to as “Ngweni ‘Legal Deconstruction’”) 116; R Lake. *Discrimination against People with Mental Health Problems in the Workplace: A Comparative Analysis*. (2005) 136-183; M Christianson. Disability Discrimination in the Workplace. In: E Strydom (ed). *Essential Employment Discrimination Law*. (2004) 154 at 164-173 and E Klinck. People with Disabilities. In: MP Olivier, N Smit and ER Kalula (eds). *Social Security: A Legal Analysis*. (2003) 311 at 313-317.

⁴⁴⁷ Section 1 of the EEA.

to steal or light fires; disorders that affect a person's mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognised programme of treatment; and normal deviations in height, weight and strength, and conventional physical and mental characteristics and common personality traits.”⁴⁴⁸

In *IMATU*, Murphy AJ used the above definition of “people with disabilities”, which he sourced from Item 5 of the Code of Good Practice on Key Aspects of Disability in the Workplace,⁴⁴⁹ to interpret the meaning of “disability” in s 6(1) of the EEA. Clearly he used an erroneous source, as the EEA itself defines “people with disabilities”. Be that as it may, most commentators have accepted the definition of “people with disabilities” to circumscribe the protected class for purposes of Chapter 2 of the EEA.⁴⁵⁰

Ngwena,⁴⁵¹ however, argues that “people with disabilities” is meant to apply only in respect of Chapter 3 of the EEA, which deals with affirmative action measures. In his view, the requirement that the impairment must be substantially limiting is unnecessary for defining the protected class for anti-discrimination purposes, but necessary for limiting who qualifies as persons with disabilities for purposes of affirmative action. For present purposes, I will assume that the definition of “people with disabilities” applies in respect of both Chapters 2 and 3 of the EEA.⁴⁵²

⁴⁴⁸ Item 5.1.3(iv).

⁴⁴⁹ South Africa. Department of Labour. *Code of Good Practice on Key Aspects of Disability in the Workplace*. (2001) <http://www.labour.gov.za/DOL/legislation/codes-of-good-practice/employment-equity/code-of-good-practice-on-disability-in-the-workplace> (Accessed: 6 February 2015) (hereinafter referred to as “the Disability Code”) para 90. The Code was issued in terms of s 54(1)(a) of the EEA in August 2002. Its aim is to provide information to employers in the implementation of the Act.

⁴⁵⁰ Christianson 165 and Lake 141 use the definition without comment, while Garbers 28 fn 45 argues that the Disability Code clearly foresees the use of the definition in the prohibition on discrimination.

⁴⁵¹ Ngwena ‘Search for Equality’ 450-451.

⁴⁵² While I agree that there may be good reasons to take a restrictive approach to the class of beneficiaries for purposes of affirmative action, I am of the view that such restrictions ought not to be based on the nature and extent of functional limitations, but on indicators of social marginalisation that may or may not correlate with these.

When the EEA amendments of 2013 were debated in Parliament, the Department of Labour made it clear that it is a conscious choice not to have a more specific definition of disability in the EEA.⁴⁵³ The preferred approach relies on the above statutory definition that is then amplified in the Disability Code as well as the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG).

4.4.4.1 Impairment as the cornerstone of disability

Ngwena reasons that impairment has to form the basis of how we define disability as a protected class, because otherwise it would be difficult to distinguish disability from other categories such as race, gender and pregnancy.⁴⁵⁴ If one bears in mind that some constitutional scholars had suggested that there should be no listed grounds in the Interim Constitution and that judges should decide on a case-by-case basis whether unfair discrimination has occurred,⁴⁵⁵ it becomes clear that having clearly defined protected categories was a choice made by the constitutional drafters and the legislators who drafted subsequent non-discrimination legislation.

Specified grounds provide guidance to judges as to when differentiation may or may not be acceptable. Such guidance mediates any concerns around the separation of powers, particularly in a context in which the transformation of the judiciary is contentious.⁴⁵⁶ In theory, at least, guidance also promotes consistency in decision-making, an important component of the rule of law.⁴⁵⁷ It may also aid judicial

⁴⁵³ Department of Labour. "Response to Employment Equity Amendment Bill, 2012." (2013) <http://www.pmg.org.za/files/130820eeab.ppt> (Accessed: 11 August 2014).

⁴⁵⁴ Ngwena 'Search for Equality' 451.

⁴⁵⁵ H Corder, S Kahanovitz, J Murphy, C Murray, K O'Regan, J Sarkin, H Smith and N Steytler. *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate*. (1992) 30-32.

⁴⁵⁶ Fears that an unelected, unrepresentative minority would inhibit the collective wishes of duly elected representatives of the people are exacerbated in a context in which the legal profession and the judiciary do not reflect broadly the demographics of the South African population. See N Manyathi-Jele. "Women and the Judiciary." (2014) 546 *De Rebus* 6-10 for a discussion of the difficulties in securing racial and gender representivity on the bench. See, also, M Pieterse. "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience." (2004) 26 *Human Rights Quarterly* 882 at 904, who notes that "a large scale transformation of judicial culture and practice [is] necessary in order for judicial vindication of human rights to be fruitful."

⁴⁵⁷ J Raz. The Rule of Law and its Virtue. In: A Kavanagh and J Oberdiek (eds). *Arguing about Law*. (2013) 181 at 183-184 argues that one of the principles that flows from the rule of law is that laws

accountability in that judges can rely on reasoning that has developed in relation to particular protected grounds, which could improve the contextual explanations they are able to provide for their decisions. This same feature may, however, become a weakness in that relevant similarities and relationships with other protected grounds are not recognised, as intimated by Mokgoro J in *Larbi-Odam*. She warned that “[t]he temptation to force them [the protected grounds] into neatly self-contained categories should be resisted.”⁴⁵⁸

In the same passage she made several general observations about the specified grounds in the Interim Constitution:

“What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.”

Four interrelated aspects of this exposition bear mention in the context of disability. Firstly, historical context is important in the interpretation of the protected categories, including decisions on their respective ambits. Secondly, what the grounds have in common is that differentiation on those grounds has the potential to impair people’s dignity. Thirdly, the features of the protected grounds which Mokgoro J mentions are particularly relevant for disability in that the debates on conceptions of disability are in essence about which features of disability to emphasise. Fourthly, the intersections of disability with other protected categories have to be taken into account to ensure a more holistic understanding of discrimination and how it affects

must be relatively stable: “Stability is essential if people are to be guided by law in their long-term decisions.” He further asserts (at 190) that “the law to be law must be capable of guiding behaviour, however inefficiently.”

⁴⁵⁸ *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) para 16.

people as individuals and as members of certain groups in our society.

The purpose of non-discrimination and having protected groups has to guide our interpretation of the meaning of disability in this context. This is a simple, yet easily overlooked principle in the context of disability. Historically, disability has been implicated in the law in limited circumstances that focus on disability as injury. These include decisions on whether people should be awarded compensation for personal injury in terms of the law of delict; who can be excused from work and should be entitled to social benefits, such as social assistance, workers' compensation and compensation for road accidents; whether people have the capacity to manage their own affairs or enter into contracts; and whether people have the requisite criminal capacity.

The nature of most of these legal processes lends itself to the entrenchment of disability as deficit and personal tragedy. While impairments create difficulties for many people and ignoring these difficulties may in itself be oppressive,⁴⁵⁹ the tendency of the law to individualise means that the systemic social and economic factors that frequently produce impairments are often left out of legal narratives. The determination of the protected class and the explanation for the existence of such a class is one of the few opportunities we have to engage with the lives and circumstances of disabled people and to consider disability as social oppression.

Furthermore, one of the consequences of social oppression is that “the negative stereotypes and material disadvantages connected to disability” may often encourage “people, where possible, to normalise suffering and disease so as to not include themselves in a despised and disadvantaged sub-group.”⁴⁶⁰ It is arguable that this stigma was at least partly responsible for the position adopted by the AIDS Law Project in its capacity as *amicus curiae* in the *Hoffmann* case. It argued that one of the reasons asymptomatic HIV-positive individuals should not be regarded as

⁴⁵⁹ See, for example, Miceli 6.

⁴⁶⁰ Abberley 'Concept of Oppression' 17.

disabled is because they “are entirely capable of discharging employment duties.”⁴⁶¹ This view equates disability with incapacity and disregards social and environmental factors as causes of disability.

It is therefore regrettable that the emphasis in defining disability remains on the functional limitations of the individual disabled person, rather than on social oppression related to bodily difference or impairment. The public policy exclusions, in particular, are extreme in their failure to acknowledge social oppression as an important cause of disability. Perpetrators of discrimination against people who are excluded are not required to explain their conduct, policy or practice.⁴⁶² The employability of the excluded person is ignored.⁴⁶³ Instead of limiting rights in terms of a reasoned balancing exercise, the exclusions are based on stereotypes and stigmatise certain types of impairments.⁴⁶⁴

Ngwena argues that the emphasis on individual functioning can partly be attributed to the seepage of social welfare definitions of disability, which are inevitably restrictive, into definitions used in non-discrimination law.⁴⁶⁵ Another possible reason relates to the continued hegemony of the medical profession in matters concerning impairment. Perju argues that the early proponents of the social model, as a matter of political strategy, chose not to theorise about medical impairments at all.⁴⁶⁶ There have therefore not been concerted, structured attempts to construct impairment differently for purposes of non-discrimination law. Courts, understanding their role as being to weed out undeserving claims and to interpret legislation in ways that make it administrable, therefore had nothing with which to replace the persistent biomedical approach to disability and are still clinging to it today.⁴⁶⁷

⁴⁶¹ AIDS Law Project. “Main Submissions on behalf of Amicus Curiae.” (2000) <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/iYXvL8nle6/MAIN/193180011/523/1268> (Accessed: 6 February 2015). See, also, F Bhabha. “Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative.” (2009) 25(2) *South African Journal on Human Rights* 218 (hereinafter referred to as “Bhabha ‘Disability Equality’”) at 230-231.

⁴⁶² CG Ngwena. Reasonable Accommodation. In: JL Pretorius, E Klinck and CG Ngwena (eds). *Employment Equity Law*. (2014) (hereinafter referred to as “Ngwena ‘Reasonable Accommodation’”) 7-32.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ngwena ‘Search for Equality’ 422.

⁴⁶⁶ VF Perju. “Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States.” (2011) 44 *Cornell International Law Journal* 279 at 282-283.

⁴⁶⁷ Perju 283.

He notes that in the American and European context, the path dependency of the definition of disability has been an important factor in whether the relevant role players have been willing to adapt the definition of disability in conformity with a social approach.⁴⁶⁸ One option is to delete medical impairments from the definition of disability altogether, but Perju argues that this may be too radical a suggestion in light of the centrality of medical impairments to the construction of disability in the legal context.⁴⁶⁹

A more moderate alternative is to find ways of articulating the social effects of medical impairments, rather than to focus on the nature of such impairments.⁴⁷⁰ This moderate option is illustrated in the Disability Code, which states that

“the scope of protection for people with disabilities in employment focuses on the effect of the disability on the person in relation to the working environment, and not on the diagnosis or the impairment.”⁴⁷¹

However, this principle is not reflected in the eligibility requirements for disability. Lake, for example, notes the Disability Code’s definition of a mental impairment as a “clinically recognised condition or illness that affects a person’s thought processes, judgment or emotions.”⁴⁷² She argues that the requirement that a condition be “clinically recognised is inconsistent with the principle that the emphasis is on the effect of impairments rather than the impairments themselves; that it privileges medicalisation, which will make dispute resolution more expensive; that some diagnoses, such as some personality disorders, are stigmatising; and that the emphasis on clinical diagnosis is biased towards allopathic medicine.”⁴⁷³ She therefore recommends the removal of the requirement of clinical recognition from the Disability Code or, alternatively, that a clinical diagnosis should only be regarded as prima facie proof of the existence of a mental impairment.⁴⁷⁴

⁴⁶⁸ Perju 287, 347.

⁴⁶⁹ Ibid.

⁴⁷⁰ Perju 347.

⁴⁷¹ Item 5.1.

⁴⁷² Lake 143-144.

⁴⁷³ Lake 151-152.

⁴⁷⁴ Lake 153.

It is important to note that challenges to biomedical approaches to impairment may emanate from within the medical fraternity itself. As noted in Chapter 2, for example, approaches from within occupational therapy have shifted from a sole focus on objective observation of people's participation to now also include people's experiences of their own participation.⁴⁷⁵ In the next chapter, the discussion of the *IMATU* case will illustrate the differing approaches that medical professionals took in assessing whether someone was able to do a particular job.⁴⁷⁶

4.4.4.2 The importance of the recognition of social oppression

The central purpose of the protected class of disability in non-discrimination law is not to weed out undeserving claims. Such an approach perpetuates the prejudiced view that marginalised groups, such as disabled persons, are out to “cheat the system” to gain unearned benefits.⁴⁷⁷ Even if the protected class is defined broadly, the other requirements for an unfair discrimination claim will still have to be satisfied.

Bagenstos articulates what I agree should be the guiding principle in determinations of whether someone can claim protection from discrimination on the grounds of disability when he writes:

“‘Disability’ is a condition in which people – because of present, past, or perceived ‘impairments’ – are viewed as somehow outside of the ‘norm’ for which society’s institutions are designed and therefore are likely to have systematically less opportunity to participate in important areas of public and private life. Even though people with ‘disabilities’ may have vastly different medical conditions – indeed, many may experience no medical limitations at all – they have one crucial thing in common: a socially assigned group status that

⁴⁷⁵ See 2.3.1.3. See, for example, M Motimele. *Disability and Violence: A Narrative Inquiry into the Journey of Healing*. (2013) 32, where the research methodology used in the field of occupational therapy was aimed at uncovering people's experiences of occupational participation after they had acquired an impairment through violent incident(s). This qualitative approach required participants to “reflect on the past and the present – and share their experience embedded within a context.”

⁴⁷⁶ See 5.4.5.

⁴⁷⁷ S Yee. “Where Prejudice, Disability and ‘Disablism’ Meet.” (2000) <http://www.dredf.org/international/Yee0.3.html> (Accessed: 6 February 2015) 18 argues that in the American context, the suspicion with which disabled persons are often regarded has fuelled media reports of undeserving claimants and a backlash against the Americans with Disabilities Act (ADA).

tends to result in systematic disadvantage and deprivation of opportunity.”⁴⁷⁸

Various consequences flow from an approach that centres social oppression. In terms of this approach, functional limitations will be the focus not at the initial stage of determining eligibility for protection, but when determinations are made as to whether discrimination is unfair and whether unfair discrimination is justifiable. If impairment is regarded as an indispensable component, its social effects, rather than its nature and extent, will be emphasised. Furthermore, in cases where physical, intellectual or psychosocial conditions have been mitigated so that they do not affect functioning, disability may still flow from the stigma and negative stereotypes that lead to disadvantage.⁴⁷⁹ Similarly, perceived disability and differentiation on the basis of association with a disabled person could bring complainants within the protected class.⁴⁸⁰

An important aspect of the recognition of disability as social oppression is to examine the nature of disability oppression. The similarities between the oppression experienced by disabled persons and that experienced by other groups on the basis of race and gender are important.⁴⁸¹ There are also instances in which disability and

⁴⁷⁸ SR Bagenstos. “Subordination, Stigma, and ‘Disability’.” (2000) 86(3) *Virginia Law Review* 397 at 401.

⁴⁷⁹ See HM Government. Office of Disability Issues. *Equality Act 2010 Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability*. (2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf (Accessed: 6 February 2015) for examples of how the British Equality Act has incorporated some elements of social understandings of disability into its definition of disability. These include the recognition of managed or treated conditions as disabilities (on this view, the *IMATU* decision that someone with insulin-dependent diabetes is not disabled would be incorrect); the inclusion of persons with cancer, multiple sclerosis or HIV infection from the point at which they are diagnosed and protection for those who had disabilities in the past, as well as those who are perceived to have an impairment.

⁴⁸⁰ Lake 176 references a Draft Code of Good Practice on Disability in the Workplace, which provided (at para 5) for perceived impairments and discrimination based on association with a disabled person in the following terms:

“Employers may not unfairly discriminate against employees or applicants for employment, because the employer suspects or believes, whether the belief or suspicion is correct or not, that the applicant or employee has an impairment that amounts to a disability, or that they have been disabled or they are, or have been, associated with other people who are, or have been, disabled. People in a relationship, or association with, or those who have responsibility for, a person with a disability, have, under the Act, Chapter II's rights to protection against unfair discrimination but not Chapter III's affirmative action protections.”

This provision did not make it into the Code of Good Practice that was adopted and which still applies.

⁴⁸¹ See, for example, Ngwena as cited in fn 21.

other categories of marginalisation, such as race, gender or class, intersect to create multiple forms of oppression, including within disability movements.⁴⁸² However, as Abberley points out,

“[a] crucial feature of oppression and the way it operates is its specificity, of form, content and location; so to analyse the oppression of disabled people in part involves pointing to the essential differences between their lives and those of other sections of society, including those who are, in other ways, oppressed.”⁴⁸³

Abberley’s call for specificity would require consideration of whether, and if so, how specific conditions or impairments are stigmatised. Those classified as having intellectual impairments, for example, may experience challenges that wheelchair users are not confronted with and vice versa. Similarly, the nature of the oppression experienced by people whose atypical characteristics or impairments are visible may be materially different from that experienced by people whose deviations from the ‘norm’ are invisible.

Improved understanding of the specific ways in which stereotyping or stigma operates may alert those interacting with disabled individuals of their own prejudices that may adversely affect such disabled persons. It may also translate into a genuine valuing of difference that transcends mere tolerance. In the words of Addis, “[t]o have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding of the Other if one is not prepared to engage the Other in a dialogue.”⁴⁸⁴

⁴⁸² J McKenzie. Disability Activism and Participation. In: T Lorenzo (ed). *Disability Catalyst Africa: Intentions, Pillars and Players*. (2011) 13 at 15 writes:

“The disability movement has, for obvious reasons of identity and political action, highlighted a disability identity and given minimal recognition to the fact that every person has multiple identities of which disability may be only one. Experience in other social movements informs us that the dangers of such an approach are that other forms of difference are submerged and the movement runs the risk of duplicating social inequalities [...] within the movement.”

⁴⁸³ Abberley ‘Concept of Oppression’ 7.

⁴⁸⁴ A Addis. On Human Diversity and the Limits of Toleration. In: I Shapiro and W Kymlicka (eds), *Ethnicity and Group Right: Nomos XXIX*. (1997) 112 at 121.

It may also transpire that specific conditions or impairments are regarded as incompatible with the performance of specific kinds of work. For example, an insulin-dependent diabetic such as Mr Murdoch from the *IMATU* case may be less likely to experience prejudicial attitudes when applying for a position as an accountant than when he applied for a job as a firefighter. Similarly, it mattered that Mr Hoffmann, who was HIV-positive, wanted to work as a cabin attendant for a commercial airline and not in some other capacity where he would be less likely to work in close proximity to passengers.

4.5 Causes of discrimination and the limitations of duties to refrain from discriminating

The EEA prohibition on discrimination is limited to those caused by an “employment policy or practice”.⁴⁸⁵ Theron argues that while the EEA makes a symbolic statement regarding systemic inequality, one of the constraints is the fact that the only form of aberrant conduct that falls within the scope of unfair discrimination is harassment.⁴⁸⁶ In his view, only “the most misguided employer would adopt a policy that would flagrantly discriminate.”⁴⁸⁷ This means that the only scope the EEA offers for addressing systemic inequality will be through remedying discriminatory employment practices or through the creative use of the prohibition on harassment.⁴⁸⁸

In contrast to the limited scope of the EEA non-discrimination provisions, the PEPUDA’s definition recognises that discrimination can be caused by “any act or omission, including a policy, law, rule, practice, condition or situation.” The causes of discrimination that are recognised clearly include structural impediments to the

⁴⁸⁵ Section 6(1).

⁴⁸⁶ J Theron. Plus ça Change: Re-inventing Inequality in the Post-apartheid Workplace. In: OC Dupper and C Garbers (eds). *Equality in the Workplace: Reflections from South Africa and Beyond*. (2010) 121 at 126.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

advancement of protected groups.⁴⁸⁹ The PEPUDA expressly recognises these impediments and requires that

“[t]he existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy”

be acknowledged and taken into account.⁴⁹⁰

In this spirit, the Act’s expansive definition of discrimination includes “unwritten and often hidden rules, forms of behaviour and attitudes.”⁴⁹¹ It also implies that discrimination can be caused by ongoing situations and not just discrete conduct.⁴⁹² However, there is a limit to anti-discrimination law’s potential to address structural inequalities. As Hepple notes, “legal concepts have to be relatively clear and they can be enforced only against identified persons.”⁴⁹³ The required clarity of concepts will be discussed in the next chapter, while the imposition of duties and their enforcement receive attention below.

Disadvantage has traditionally been characterised as either social or economic, or to put it differently, disadvantage may relate to social misrecognition or to the distribution of economic resources.⁴⁹⁴ Redistribution has traditionally been thought to be the primary concern of social policy in the welfare state, whereas recognition is dealt with through laws, with equality rights as the bedrock of protection.⁴⁹⁵ However,

⁴⁸⁹ Albertyn, Goldblatt and Roederer 33.

⁴⁹⁰ Section 4(2)(a).

⁴⁹¹ Albertyn, Goldblatt and Roederer 33.

⁴⁹² Ibid.

⁴⁹³ Hepple ‘Aims and Limits’ 12.

⁴⁹⁴ Fredman ‘Redistribution and Recognition’ 214. A Silvers. “Protection or Privilege? Reasonable Accommodation, Reverse Discrimination, and the Fair Costs of Repairing Recognition for Disabled People in the Workforce.” (2005) 8 *Journal of Gender, Race and Justice* 561 at 566 explains recognition and misrecognition thus:

“Attaining proper recognition for citizens is a very important democratic good. Proper recognition develops from a social environment that is respectful of the kind of individual each really is. Such an environment sustains individuals by affirming the equal social inclusion of people of their kind. Protecting the inclusion of different kinds of people sometimes requires facilitating the social arrangements needed by their group or kind to flourish, given the way they live their lives. Misrecognition occurs when the social environment excludes, impedes, or belittles people because of their group or kind.”

⁴⁹⁵ Fredman ‘Redistribution and Recognition’ 214.

it is increasingly recognised that this dichotomy should not hide the interactions between these types of disadvantage. Fredman points to three developments that emphasise the interrelationship between distribution and recognition: (i) the relative economic disadvantage of marginalised groups, such as Black people and women; (ii) groups such as disabled people, who had previously only been dealt with in terms of welfare, now being protected by anti-discrimination laws; and (iii) justiciable socio-economic rights means that economic disadvantage is now infused with rights analyses, which had not been the case before.⁴⁹⁶

The economic exclusion of disabled people is related to the fact that unfounded assumptions are made about their ability to participate, socially as well as economically. Their economic exclusion, in turn, reinforces the notion that they are not economically and socially useful citizens.⁴⁹⁷ However, as Hepple points out, anti-discrimination law is directed at “only specific elements in the many causes of disadvantage, mainly those which arise from a specific status such as race or gender.”⁴⁹⁸ Furthermore, disputes at a micro level will require fairly specific causal connections between the respondent’s actions, practices or circumstances for which the respondent can be held responsible on the one hand, and the complainant’s disadvantage – which must be linked to a status, as defined – on the other hand.

The major consequence of the legal requirements of conceptual specificity and the proof of close causal connections is that deep structural barriers to disabled people’s participation cannot be addressed solely through negative, reactive prohibitions on discrimination. It is recognised that positive duties have to be imposed in order to achieve substantive equality. However, these positive duties may straddle prohibitions on discrimination as well as form part of affirmative action programmes targeting the advancement of marginalised groups.

⁴⁹⁶ Fredman ‘Redistribution and Recognition’ 215.

⁴⁹⁷ P Abberley. “The Significance of Work for the Citizenship of Disabled People.” (1999). <http://disability-studies.leeds.ac.uk/files/library/Abberley-sigofwork.pdf> (Accessed: 6 February 2015) (hereinafter referred to as “Abberley ‘Significance of Work’”) 5 notes that disabled people’s social exclusion is intimately related to their exclusion from work.

⁴⁹⁸ Fredman ‘Redistribution and Recognition’ 215.

A constraint that operates in respect of disabled job applicants flows from a combination of the reactive, adversarial nature of the remedy provided by the EEA or the PEPUDA and the structural exclusion that disabled people face in multiple spheres. Many, if not most, disabled people in South Africa will not be able to bring such claims without support. Furthermore, job applicants who in many instances would be desperate for employment are even less likely to be able to litigate. Aggrieved applicants with mobility impairments may find that court buildings are not accessible,⁴⁹⁹ or those with other impairments may also face structural barriers that make litigation even more unattractive.

If an applicant falls under the protection of the EEA and earns below a certain threshold, the 2013 amendment to the EEA will assist in that claims for unfair discrimination can now be referred to the CCMA, instead of the Labour Court being the first port of call for aggrieved persons.⁵⁰⁰ Given how recent the amendments are, it is not possible to assess how effectively and efficiently the CCMA will discharge this new function. The advantage of CCMA jurisdiction is that the processes are less formal. However, there are competitive advantages if employers are able to secure the services of legal counsel, while job applicants appear without representation or are represented by union shop stewards.

⁴⁹⁹ W Holness and S Rule. "Barriers to Advocacy and Litigation in the Equality Courts for Persons with Disabilities." (2014) 17(5) *Potchefstroom Electronic Law Journal* 1906 at 1912-1913 identify three barriers to access to the Equality Courts:

"Firstly, some Equality Courts are geographically (and financially) inaccessible. Secondly, the negative and insensitive attitudes of frontline workers impact on the ability of persons with disabilities to bring equality claims to and access the services of the Equality Court. These barriers also constitute discrimination and flout article 13 of the CRPD, which requires the provision of support for persons with disabilities to access the justice system. Thirdly, cultural norms and fears impede access to courts and the agency of persons with disabilities to bring these claims. Examples of this are the requirement that traditional leaders provide "permission" to persons with disabilities to sue, and a similar requirement of permission from the in-laws of women with disabilities. This contravenes the state's obligation to alter social norms regarding persons with disabilities under article 8 of the CRPD."

⁵⁰⁰ See 4.2.2.

4.6 Concluding remarks

Duties to refrain from discriminating have a role to play in ensuring that disabled people who are willing and able to work are not prevented from doing so. However, difficulties of proof in cases of both direct and indirect discrimination inhibit the effectiveness of these remedies. Furthermore, the biomedical-impairment based eligibility requirements for disability may restrict the class of persons that can rely on the EEA's protection.

The choice of how to define the prohibited ground of disability is influenced by and reflects normative commitments.⁵⁰¹ If the definition is determined in a manner that implicates dominant groups in the historical and continued marginalisation of the protected class, the natural consequence is an emphasis on the social dimensions of rights, which is more consistent with both social understandings of disability and notions of substantive equality.

Duties of restraint do not address structural impediments to disabled persons' access to work. We therefore have to examine in which circumstances failures to act can constitute unfair discrimination. The imposition of positive duties constitutes an acknowledgement that structural inequalities require that certain groups be treated differently in order to function within a society in which the norms are skewed in favour of dominant groups. In order to establish how these duties seek to remedy disadvantage and how effective they are, we have to examine their content, who the duty bearers are and how they are enforced. These matters are addressed in the next two chapters.

⁵⁰¹ PE Berg. "III/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law." (1999) 18(1) *Yale Law and Policy Review* 1 at 23 writes: "In antidiscrimination law, the types of impairments included in and excluded from the category of disability [...] reveal the values and normative assumptions that underlie and are reinforced by this body of law."

CHAPTER 5: POSITIVE NON-DISCRIMINATION AND AFFIRMATIVE ACTION DUTIES

5.1 Introduction

The previous chapter engaged with prohibitions on discrimination, but discussion was limited to the duties to refrain from discriminating. This chapter now moves to positive duties imposed on employers, with particular emphasis on the duty to provide reasonable accommodation. Reasonable accommodation is emphasised due to its importance, but also because affirmative action for disabled people in more general terms would warrant more attention than can be devoted to it here. Affirmative action will therefore only be discussed insofar as it is relevant to reasonable accommodation.

Another delimitation on the treatment of reasonable accommodation here is that the duty will only be discussed as it relates to employers. For job applicants, reasonable accommodation duties on government that may be sourced from the PEPUDA may be of the utmost importance in ensuring their access to work. An example is inaccessible transportation systems that hamper disabled people in their search for work or in their access to workplaces once they have secured work.⁵⁰²

Part 2 of this chapter focuses on the rationale for reasonable accommodation and how it fits within the framework of South African equality law. Part 3 examines reasonable accommodation as a positive duty. In Part 4, some aspects relating to its implementation, and the implementation of positive duties more generally, are highlighted. Parts 5 and 6 then analyse how positive duties give effect to social understandings of disability and may promote substantive equality and structural change.

⁵⁰² See, for example, s 9 of the PEPUDA.

5.2 Reasonable accommodation

5.2.1 The rationale for reasonable accommodation

The positive obligation to reasonably accommodate persons with disabilities has been described as ‘central to’, ‘at the core of’ and as ‘the most important aspect of’ disability non-discrimination laws. In the words of Lisa Waddington,

“[T]he obligation to make a reasonable accommodation is based on the recognition that, on occasions, the interactions between an individual’s inherent characteristics, such as impairment, sex, religion or belief, and the physical or social environment can result in the inability to perform a particular function or job in the conventional manner. The characteristic is therefore relevant in that it can lead to an individual being faced with a barrier that prevents him or her from benefiting from an employment opportunity that is open to others who do not share that characteristic. The resulting disadvantage is exclusion from the job market, or a restricted set of employment opportunities.”⁵⁰³

There have been continuous debates in various jurisdictions about the nature of reasonable accommodation duties and how these ought to be construed. Some commentators have characterised them as preferential treatment that, from a neoclassical economic perspective, constitute efficiency burdens.⁵⁰⁴ In this view,

⁵⁰³ L Waddington. Reasonable Accommodation. In: D Schiek, L Waddington and M Bell (eds). *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*. (2007) 629 at 631.

⁵⁰⁴ SD Harris and MA Stein. “Workplace Disabilities.” (2008) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1226433 (Accessed: 6 February 2015) 4. MA Stein. “The Law and Economics of Disability Accommodations.” (2003) 53(1) *Duke Law Journal* 79 (hereinafter referred to as “Stein ‘Disability Accommodations’”) at 119 writes: “The comprehensive normative goal of neoclassical economics is to design efficient legal regimes. As such the model begins from the premise that markets for goods and services operate efficiently. As part of this postulate it is assumed that markets determine prices, free bargaining is the norm, and knowledge is completely and symmetrically disseminated, resulting in prices based on production. Under this theory, market forces also discipline employers with irrational (and thus inefficient) tastes against particular groups by driving those employers from the market.” See, also, SR Bagenstos. “Rational Discrimination’, Accommodation, and the Politics of (Disability) Civil Rights.” (2003) 89(5) *Virginia Law Review* 825 at 825-826, who notes that commentators in the US – those in favour of reasonable accommodation measures as well as those opposed to them – have generally sought to draw a sharp distinction between reasonable accommodation and non-discrimination in terms of the ADA. At 828 he explains:

accommodations incur costs and are redistributive in a way that traditional prohibitions on discrimination are not.⁵⁰⁵ For this reason, so the argument goes, duties to accommodate must be interpreted restrictively, because it is not fair to saddle employers with the costs of redistribution and it may not be fair to other employees. In terms of this model, employers, when forced to hire disabled people, bear costs that they would not have otherwise incurred.⁵⁰⁶

Critiques of this neoclassical perspective question its underlying assumptions. The first objection is that the labour market does not, in fact, function efficiently in allocating work to people with disabilities, because employers do not have the information necessary to choose the workers who would yield the highest net

“The conventional wisdom, as evidenced by a near-consensus in the literature, seems to be that there is a fundamental normative difference between antidiscrimination requirements and accommodation mandates: Antidiscrimination requirements call on employers to forego acting on illegitimate preferences (like aversive prejudice) that they ought not to have in the first place, while accommodation mandates prohibit employers from acting on the normally legitimate desire to save money. Those who take this view and are skeptical of accommodation mandates believe that one who discriminates is deserving of moral condemnation, while one who simply fails to accommodate should not be condemned. Those who take this view and endorse accommodation mandates acknowledge that the argument for requiring accommodation is more difficult and controversial than the argument for prohibiting discrimination. But in either case, there is a major difference in substance between antidiscrimination requirements and accommodation mandates.”

⁵⁰⁵ Silvers ‘Protection or Privilege’ 571 cites the US Supreme Court decision in *US Airways, Inc. v Barnett* 535 US 391 (2002) <http://www.law.cornell.edu/supct/html/00-1250.ZS.html> (Accessed: 6 February 2015) as an example of this type of reasoning. In that case a cargo handler was injured on duty and could no longer lift baggage. He was transferred to the airline’s mail room. After two years his position was declared biddable and in terms of the seniority-based system the employer had imposed unilaterally, anyone who was more senior than Mr Barnett could take his job. Two employees bid for his job in terms of this system and he requested that he be accommodated by being assigned permanently to the mail room. The airline considered his request but eventually refused, saying that it would not be fair to other employees, who had to abide by the seniority system. The Court (at 5) held that reasonable accommodations in terms of the ADA required the employer to treat disabled employees “differently, i.e. preferentially”. In the Court’s view, such preferential treatment should not ordinarily trump a seniority system, even if the employer imposed such a system unilaterally and was not contractually bound to maintain it. Justice Breyer recognised that the preferential treatment may be necessary to achieve the ADA’s “basic equal opportunity goal” (at 5), but held that seniority systems promote fair, uniform treatment of employees (at 12) and employers therefore need only show the existence of such a system in order to justify the refusal of a disability accommodation. This general rule applies unless a disabled employee can prove special circumstances that require the accommodation to trump the seniority rule. A similar neoclassical economic approach is reflected in the US Supreme Court’s decision in *Board of Trustees of the University of Alabama v Garrett* 531 US 356 (2001) <http://www.law.cornell.edu/supct/html/99-1240.ZS.html> (Accessed: 6 February 2015), in which Chief Justice Rehnquist (at 14) suggested that the ADA’s requirement that employers make facilities readily accessible and usable by disabled people coerced state employers into acting irrationally by not using scarce financial resources to hire employees that could use existing facilities.

⁵⁰⁶ Stein ‘Disability Accommodations’ 120.

productivity.⁵⁰⁷ Writing in the American context, Verkerke⁵⁰⁸ uses the example of an employer hiring a person with a disability that is not readily apparent. In the absence of a duty to accommodate, that employer may simply dismiss the employee on the grounds of disability. That same employee may then apply for subsequent positions with other employers and the cycle could repeat itself, until eventually even employers who are well-matched to the employee will not hire her. Harris⁵⁰⁹ invokes another type of information asymmetry in which employers are unwilling to divulge information needed to plan for accommodations and disabled employees are reluctant to divulge information related to their impairment. He notes that even when an employee is hired, an employer may be ill-equipped to make particular accommodations. The result of these asymmetries is that the parties do not discuss or agree upon cost-effective accommodations.

Harris and Stein⁵¹⁰ point to another weakness in the premise that the labour market is efficient. If 'efficiency' means total labour costs and the costs of accommodations minus total labour productivity, it fails to take into account the benefits of disability accommodations to other workers, the organisation or clients. One example is the improvement of telecommunication systems. Furthermore, the costs of accommodations that are said to be in favour of disabled people, but which benefit others, cannot then be charged only to individual disabled people and as a once-off expense.

The second objection to the neoclassical economic approach relates to its assumption that labour markets are competitive. This assumption may be materially flawed if each firm presents with barriers to entry, which includes "firm-specific skills

⁵⁰⁷ Harris and Stein 5.

⁵⁰⁸ JH Verkerke. "Is the ADA Efficient?"(2002-2003) 50 *University of California Los Angeles Law Review* 903 at 911. Verkerke explains (at 910) that employee turnover – the process through which employees move from one job to another – is essential to labour market efficiency, which requires that employees are well matched to the jobs tasks. Under conditions of incomplete or asymmetric information, Verkerke reasons (at 910-911), three types of inefficiencies may result: (i) mismatching occurs when employers have inadequate information about current or prospective employees; (ii) churning happens when employees change jobs, but the changes do not improve the match between those employees and their jobs; and (iii) scarring is when employers rely on market signals that are influenced by, inter alia, information deficiencies, to refuse to hire workers who could in fact be productive.

⁵⁰⁹ SD Harris. "Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC's Mediation Program." (2008) 13 *Harvard Negotiation Law Review* 1 (hereinafter referred to as "Harris 'Disabilities Accommodations'") at 9-10.

⁵¹⁰ Harris and Stein 7-8.

and knowledge, job matching or efficiency wages.”⁵¹¹ In this scheme, the employer and incumbent employees create a bilateral monopoly that may strengthen over time. If this is empirically established – and in the US context some argue that there is evidence that making accommodations to employees may not always decrease net productivity – it means that employers could, in certain circumstances, gain from making accommodations.⁵¹²

The third objection is that disabled workers may not require accommodations as often as is suggested and that accommodations may not be inherently costly.⁵¹³ The issue of costs is important, because if accommodations are regarded as redistributive devices better decided in the policy domain, courts are likely to be conscious of separation of powers concerns and may be reluctant to interfere. Furthermore, courts may be reticent to order individual employers to bear the costs of inequalities for which they cannot be held directly responsible.

A fourth difficulty critics have raised is that the neoclassical economic approach is generally underpinned by cost-benefit concerns that do not take into account the ethical choices extending beyond narrow financial trade-offs.⁵¹⁴ Nussbaum⁵¹⁵ argues that in any situation which requires choice, we have to answer the ‘obvious question’ – what shall we do? This question may be easy or difficult to answer and may involve consideration of the methodology to be used in answering it.⁵¹⁶ However, sometimes we ought to ask an oft-overlooked second question, the tragic question – is any of the alternatives open to us free from moral wrongdoing? Insofar as morality and law are not coterminous, morality may be used in the sense of the

⁵¹¹ Harris and Stein 9.

⁵¹² Ibid.

⁵¹³ Harris and Stein 10.

⁵¹⁴ Apart from the ethical concerns, there are two main arguments against cost-benefit-analysis (CBA) (see Stein ‘Disability Accommodations’ 184-185). The first concern is that CBA weighs all money equally, which works in favour of wealthy people, for whom each additional dollar may be less valuable due to diminishing returns. A second criticism is that CBA “values the present at the expense of the future by utilizing a discount rate.” This is because money depreciates in value due to inflation, which means that there may be instances in which future damage is not prevented because the discount rate would indicate that such prevention is uneconomical. However, Stein ‘Disability Accommodations’ (at 185) points out that CBA will not always discount benefits, because the proceeds of current savings may be used for other worthwhile causes.

⁵¹⁵ MC Nussbaum. “The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis.” (2000) 29(S2) *The Journal of Legal Studies* (hereinafter referred to as “Nussbaum ‘Costs of Tragedy’”) 1005.

⁵¹⁶ Nussbaum ‘Costs of Tragedy’ 1006.

‘objective, normative value system’ established by the Constitution,⁵¹⁷ as well as to connote the moral underpinnings of the rights in the Bill of Rights. Thus, the second question would be whether any of the options available to us would compromise the value system established by the Constitution or infringe on anyone’s constitutionally protected right(s).

It is within the context of these debates on the rationale for reasonable accommodation and the discussions on social understandings of disability and substantive equality in previous chapters, that we can now turn to how reasonable accommodation duties are framed in the context of work in South Africa. The next section explores the meaning of ‘accommodation’ and the nature of the duty.

5.2.2 The meaning of ‘accommodation’

‘Reasonable accommodation’ is defined in the EEA as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.”⁵¹⁸ An accommodation⁵¹⁹ is therefore any measure that changes the way work is usually performed and its goal is to allow suitably qualified disabled people to participate on an equal basis with others.⁵²⁰ In *Pillay*, Langa CJ noted that reasonable accommodation is “particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting

⁵¹⁷ See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56.

⁵¹⁸ Section 1. This wording on the aim of reasonable accommodation is similar to that of the European Employment Equality Directive Council Directive 2000/78/EC (27 November 2000) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> (Accessed: 6 February 2015), which in Article 5 states that reasonable accommodations are appropriate measures that would “enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training.”

⁵¹⁹ Other jurisdictions refer to “accommodations” as “adjustments” or “steps” or “appropriate measures: see L Waddington. “When it is Reasonable For Europeans to be Confused: Understanding When a Disability Accommodation is ‘Reasonable’ From a Comparative Perspective.” (2007) 29 *Comparative Labor Law and Policy Journal* 317 (hereinafter referred to as “Waddington ‘Reasonable Europeans’”) at 321.

⁵²⁰ South Africa. Department of Labour. *Technical Assistance Guidelines on the Employment of People with Disabilities*. (2007) <http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/Useful%20Document%20-%20EEA%20-%20Technical%20Assistance%20Guidelines%20on%20the%20employment%20of%20people%20with%20disabilities.pdf> (Accessed: 6 February 2015) (hereinafter referred to as “TAG”) Item 6.1. See, also, Waddington ‘Reasonable Europeans’ 320.

interests may more easily be struck.”⁵²¹

The type of accommodation required in each case is dependent on a range of factors: the employee and his or her impairment, the employer and the relevant work environment and the systemic consequences of providing or not providing accommodation in particular cases. It is therefore understandable that no closed list of possible accommodations exists.

The TAG state that the criteria for reasonable accommodation include three interrelated factors: (i) the measure must remove barriers that prevent a qualified⁵²² disabled person from participating fully and from reaching his or her potential; (ii) the measure must allow the specific disabled person to “enjoy equal access to the benefits and opportunities of employment”, including promotion; and (iii) employers are allowed to choose the most cost-effective means consistent with the two aforementioned criteria.⁵²³

The TAG recognise that the type of accommodation required will depend on variables such as the nature and essential functions of a job, the work environment and the nature of the impairment.⁵²⁴ Throughout the various sections, the TAG make use of examples that flow from experiences in South African workplaces. Various impairments are cited and an explanation is provided of the reasonable accommodations that had been provided in each case. Item 6.9 contains a

⁵²¹ At para 78.

⁵²² Sections 20(3), (4) and (5) of the EEA set the following general principles as to who is “suitably qualified” and how employers should go about making that determination: “(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person’s—

- (a) formal qualifications;
- (b) prior learning;
- (c) relevant experience; or
- (d) capacity to acquire, within a reasonable time, the ability to do the job.

(4) When determining whether a person is suitably qualified for a job, an employer must—

- (a) review all the factors listed in subsection (3); and
- (b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.”

⁵²³ TAG Item 6.2.

⁵²⁴ TAG Item 6.1.

“[r]epresentative list of examples of reasonable accommodation.”⁵²⁵

It is clear that the concept of reasonable accommodation is not only used in relation to people with disabilities, but may also be necessary to include Black people and women fully into workplaces.⁵²⁶ The scope of this thesis does not allow for engagement with reasonable accommodation for women and Black people, but it is important to bear in mind that accommodations have to be sensitive to all identity markers where they intersect. For example, an accommodation that alleviates the effects of impairment, but which is abhorrent to a particular employee due to cultural or religious beliefs, may not be reasonable.

5.2.3 The characterisation of reasonable accommodation in South African employment law

In South Africa, reasonable accommodation duties are non-discrimination, as well as affirmative action measures. This dual characterisation is not readily apparent, as the EEA only makes explicit mention of reasonable accommodation in Chapter 3, which deals with affirmative action. However, there are various reasons why one can infer that failure to accommodate may constitute unfair discrimination.

Firstly, section 5 of the EEA requires employers to take steps to eliminate unfair discrimination in employment policies and practices. It therefore envisages positive action to eliminate both direct and indirect discrimination. Reasonable

⁵²⁵ The list includes adaptations to facilities to make them more accessible, adaptations to equipment or the acquisition of new equipment, re-organising workstations, changing training and assessment materials, re-assigning non-essential functions to other persons and providing support such as sign-language interpreters, job coaches or readers. The examples cited in the Disability Code and TAG do not provide much detail about the nature and position of the employers who had implemented the measures cited and the processes that were followed in effecting these.

⁵²⁶ See, for example, South Africa. Department of Labour. *Green Paper on Employment and Occupational Equity*. (GN 804 in GG 17303 of 1 July 1996) http://www.gov.za/sites/www.gov.za/files/17303_gen373_0.pdf (Accessed: 6 February 2015) 31, where it is suggested that some measures will form part of most employment equity plans. These measures include: “plans for building physical infrastructure to accommodate women and disabled people; [and] investigation of more flexible hours, work-related day-care and assistance with transport or housing, if they would help level the playing ground for applicants or employees from historically disadvantaged groups.” See, also, Ngwena ‘Reasonable Accommodation’ 7-44 – 7-60 for a discussion on reasonable accommodation of pregnancy and maternity; family responsibility; and religion and culture.

accommodation seems to be particularly relevant where indirect discrimination is at issue, for, as Langa CJ has observed in the context of the PEPUDA, it is often an appropriate principle where “discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society.”⁵²⁷

The guidelines on disability in employment indicate, explicitly and implicitly, that reasonable accommodation is both a non-discrimination and an affirmative action duty. The TAG explicitly endorse this view.⁵²⁸ Furthermore, the Disability Code states that the reasonable accommodation requirement applies to all disabled job applicants and employees, which would not be the case had it been regarded only as an affirmative action measure.⁵²⁹ The duty is also owed to individual employees, which is at odds with it being solely an affirmative action measure.⁵³⁰ While the rules of statutory interpretation do not allow guidelines to statutes to be the sole determinants of meaning of such statutes, these guidelines may serve as aids to interpretation when more than one plausible interpretive option exists.⁵³¹

There are other external justifications for the view that reasonable accommodation is a non-discrimination measure. In constitutional and labour jurisprudence, failures to reasonably accommodate have been framed as violations of other individual rights.⁵³² The Constitutional Court in two separate, but related, instances has used

⁵²⁷ At para 78.

⁵²⁸ Item 6.1 at 13.

⁵²⁹ Disability Code Item 6.3. The TAG are confusing when they state that “[a]ll *designated employers* under the Act and Code ‘should reasonably accommodate the needs of people with disabilities’” [emphasis added]. This is clearly not meant to convey that it is only an affirmative action measure, as the next sentence explicitly provides otherwise.

⁵³⁰ Disability Code Item 6.

⁵³¹ See C Botha. *Statutory Interpretation: An Introduction for Students*. (2012) 153-154.

⁵³² In the labour context, it has been utilised in relation to respect for diverse religious and cultural beliefs and practices (see, for example, *Dlamini and Others v Green Four Security* (2006) 27 ILJ 2098 (LC); *Department of Correctional Services and Another v Police and Prisons Civil Rights Union (POPCRU) and Others* (2011) 32 ILJ 2629 (LAC); *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* (2012) 33 ILJ 2812 (LAC)). See, also, F Mégret and D Msipa. “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality.” (2014) 30(2) *South African Journal on Human Rights* 252 at 255-257 for a brief discussion on how reasonable accommodation as a concept originated in the US and Canada in the context of respect for religious diversity and how international law, even before the advent of the CRPD, regarded the denial of reasonable accommodation as a violation of rights. The UN Committee on Economic, Social and Cultural Rights, in General Comment No. 5 available at <http://www1.umn.edu/humanrts/gencomm/epcomm5e.htm> (Accessed: 6 February 2015) para 15, had already stated in 1994 that for purposes of the International Covenant on Economic, Social and

reasonable accommodation in cases that do not implicate disability. Firstly, the concept has animated the balancing exercise that needs to take place when deciding whether a limitation of a constitutional right is justifiable and therefore constitutional.⁵³³ Secondly, it is one of numerous factors that may be relevant in the assessment of whether discrimination was fair or unfair.⁵³⁴

A further justification is that legislation must be interpreted in compliance with South Africa's international obligations,⁵³⁵ so the fact that the CRPD considers failure to reasonably accommodate disabled persons as a form of discrimination is critically important.⁵³⁶ Article 5(2) of the CRPD requires signatory States to "prohibit all discrimination on the basis of disability." Article 2, which defines discrimination, explicitly states that it includes "denial of reasonable accommodation."

Finally, in the context of the domestic legislative framework for equality, reasonable accommodation is regarded as a non-discrimination principle. The PEPUDA states explicitly that failure to provide reasonable accommodation constitutes unfair discrimination.⁵³⁷ It is difficult to see why it would be a non-discrimination measure in

Cultural Rights (ICESCR), "disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or *denial of reasonable accommodation* based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights" [emphasis added]. See, also, Ngweni 'Search for Equality' 472-483 for a discussion of the development of reasonable accommodation jurisprudence in the US and Canada.

⁵³³ See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) and *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC).

⁵³⁴ See *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC).

⁵³⁵ Section 39 of the Constitution.

⁵³⁶ The UN Committee on the Rights of Persons with Disabilities has urged several States party to the CRPD to include in their legislation the denial of reasonable accommodation as a form of discrimination. See, for example, "Concluding Observations of the Committee on the Rights of Persons with Disabilities: Spain." (2011) <http://www2.ohchr.org/SPdocs/CRPD/6thsession/CRPD-C-ESP-CO-1%20.doc> (Accessed: 6 February 2015) para 20; "Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session." (2012) <http://www.mindbank.info/item/1387> (Accessed: 6 February 2015) para 11; "Tunisia: Concluding Observations of the Committee on the Rights of Persons with Disabilities." (2011) <http://www.mindbank.info/item/1369> (Accessed: 6 February 2015) para 13; "Concluding Observations on the Initial Report of Costa Rica." (2014) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCRI%2fCO%2f1andLang=en (Accessed: 6 February 2015) para 12.

⁵³⁷ Section 9(c) states that unfair discrimination includes a failure "to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities" or a failure to "take steps to reasonably accommodate the needs of such persons." Furthermore, in the determination of unfairness in terms of s 14, one of the factors that needs to be considered is whether the respondent has taken reasonable steps in the circumstances to "address the disadvantage which arises from or is related to one or more of the prohibited grounds" or to "accommodate diversity" (s 14(3)(i)).

terms of the PEPUDA, but not in terms of the EEA. This is so especially in light of the fact that the EEA does not contain a definition of discrimination, while the PEPUDA does. When appropriate, the latter could therefore be used as an aid in the interpretation of the former.

5.3 Reasonable accommodation as a positive duty

Reasonable accommodation is a mechanism through which to rectify the systemic exclusion and subordination faced by disabled people. Its basis in substantive equality is clear in its insistence that disabled people be treated differently to enabled persons.⁵³⁸ What is less clear is where it fits into the conceptual framework of positive duties required by employment equality law. If it is both a non-discrimination duty and an affirmative action measure, what are the consequences for job applicants and prospective employers? I will argue that, given the advantages of reasonable accommodation as a positive non-discrimination duty, reasonable accommodation as an affirmative action measure is not that important as an end in itself. However, affirmative action mechanisms, if they were to be implemented effectively, could play an important role in creating more favourable environments within which reasonable accommodation duties can be negotiated and effected.

5.3.1 The general positive non-discrimination duties

Recruitment and selection criteria and processes that exclude disabled people, either directly or indirectly, and do not relate to the inherent requirements of jobs or that can be otherwise justified as fair, constitute unfair discrimination. Section 5 of the EEA places obligations on employers to take positive steps to eliminate unfair discrimination in employment policies and practices. This is a positive non-discrimination duty that requires employers to take steps proactively, in advance of specific acts of discrimination.⁵³⁹ Reasonable accommodation is a positive non-

⁵³⁸ Ngweni 'Reasonable Accommodation' 7-21.

⁵³⁹ *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC) para 77.

discrimination duty, so it is implicated in s 5, but only insofar as it implicates employment policies and practices.⁵⁴⁰

5.3.2 The affirmative action duties

Designated employers bear the affirmative action duty to “identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups.”⁵⁴¹ The duty to provide reasonable accommodation is provided for separately from the general duty to eliminate barriers.⁵⁴² This separation does not mean that failures to accommodate do not constitute barriers to employment – the definition of reasonable accommodation in s 1 clearly foresees that it will enable a person from a designated group to access, participate or advance in employment. What it does imply is that employment barriers are not limited to those that require adjustments or modifications to jobs or work environments.

An important difference between the reasonable accommodation duty and other aspects of the duty to eliminate unfair discrimination is that the former is more appropriate in particular, localised contexts where the interests of specific employers and employees have to be balanced.⁵⁴³ It is reactive and a response to the needs of a particular person, hence the reference in the definition to “a person”.⁵⁴⁴ The other aspects of the non-discrimination duty are likely to apply to general barriers that may affect all people within particular designated groups in more or less the same manner and may therefore have a more anticipatory element. For the anticipatory aspects, the limitation is likely to relate to whether courts are of the view that the

⁵⁴⁰ The non-exhaustive definition of ‘employment policy or practice’ in s 1 of the EEA states that it includes

“recruitment procedures, advertising and selection criteria; the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; the working environment and facilities; training and development; performance evaluation; promotion, transfer and demotion; disciplinary measures and dismissal.”

⁵⁴¹ Section 15(2)(a).

⁵⁴² Section 15(2)(c).

⁵⁴³ *Pillay* para 78.

⁵⁴⁴ This is in contrast to the so-called anticipatory reasonable adjustment duties in Britain that developed because the applicable legislation at the time referred to the accommodation of disabled persons in the plural, which was interpreted to mean that the duty arose before a duty bearer was presented with a specific disabled person. See Lawson 92-93.

employer is the appropriate duty bearer, particularly if deficits are structural in nature and relate to socio-economic entitlements for which the state is the primary duty-bearer. This aspect of state duties and their role in the achievement of access to employment for disabled people will be discussed in the next chapter.

5.3.3 Differences between non-discrimination and affirmative action

In most respects the positive non-discrimination duty is stronger than the affirmative action duty for reasons relating to the respective duty bearers and protected classes. The relevant enforcement mechanisms in respect of the duties both have their strengths and weaknesses, as will be discussed below.⁵⁴⁵

5.3.3.1 The duty bearers

Affirmative action duties are imposed only on designated employers in terms of the EEA. The Act requires designated employers to design and implement affirmative action measures. It is also possible for non-designated employers to voluntarily assume the duties of a designated employer, a course of action incentivised through the preferential procurement frameworks sanctioned by s 217 of the Constitution.⁵⁴⁶

⁵⁴⁵ See 5.3.3.4.

⁵⁴⁶ This section reads:

“(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

The framework legislation mentioned in subsection (3) is the Preferential Procurement Policy Framework Act 5 of 2000. This Act and its regulations (Preferential Procurement Regulations, 2011 (GN R502 in GG 34350 of 8 June 2011) www.cacadu.co.za/content/download/67 (Accessed: 6 February 2015)) provide for the calculation of a fixed score based on a firm's Broad-Based Black Economic Empowerment (BBBEE) levels. Employment equity is an important component.

The BBBEE Act 53 of 2003 in s 1 states that it provides for measures aimed at

“the economic empowerment of all black people including women, workers, youth, *people with disabilities* and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to—

(a) increasing the number of black people that manage, own and control enterprises and productive assets;

Apart from some employers' voluntary assumption of affirmative action duties, the Labour Court, upon findings of unfair discrimination against employees, is empowered to order non-designated employers to assume affirmative action duties as if they were designated employers.⁵⁴⁷ This remedy may assist in those cases where indirect discrimination against disabled people inheres in various aspects of a respondent employer's work policies and practices.

However, for the most part, only designated employers are compelled to take affirmative action measures.⁵⁴⁸ In contrast, failures to remove employment barriers and to provide accommodation that constitutes unfair discrimination would be actionable against all employers and other duty bearers to whom the EEA and the PEPUDA apply.

5.3.3.2 Entitlement to reasonable accommodation

An unfair discrimination claim founded on an employer's alleged failure to reasonably accommodate a job applicant can be asserted by anyone who falls within a protected group, whether listed or unlisted, as is illustrated by constitutional and labour

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- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
 - (c) human resource and skills development;
 - (d) achieving equitable representation in all occupational categories and levels in the workforce;
 - (e) preferential procurement; and
 - (f) investment in enterprises that are owned or managed by black people [emphasis added]."

The Act and its Codes of Good Practice (there is a generic BBBEE Code of Good Practice published in GG 36928 of 11 October 2013 available at

http://www.dti.gov.za/news2013/code_gud_practice10102013.pdf (Accessed: 6 February 2015), as well as various sector-specific Codes) create a system in which firms are awarded BBBEE ratings based on their efforts to facilitate the empowerment of Black people in terms of five components: (i) ownership, (ii) management control, (iii) skills development, (iv) new enterprise and supplier development and (v) socio-economic development. These ratings affect the ability of firms "to successfully tender for Government and public entity tenders and (in certain sectors like mining and gaming) to obtain licences. Private sector clients also increasingly require their suppliers to have a minimum BBBEE rating in order to boost their own BBBEE ratings." See Werksmans Attorneys. "Amendments to the BBBEE Act and the Codes Explained." (2014) <http://www.werksmans.com/wp-content/uploads/2014/02/040002-WERKSMAANS-bbbee-booklet.pdf> (Accessed: 6 February 2015) 6.

⁵⁴⁷ Section 50(2)(d).

⁵⁴⁸ See *Naidoo v Minister of Safety and Security and Another* 2013 (3) SA 486 (LC) para 119, in which Shaik AJ stated:

"The implementation of affirmative action measures is not a choice; it is mandatory. Designated employers must design and implement affirmative action measures for people from designated groups."

jurisprudence.⁵⁴⁹ Affirmative action, on the other hand, is limited to those who qualify as members of one or more of the designated groups, namely women, Black people and people with disabilities. The beneficiaries of affirmative action measures are therefore members of a more narrowly defined protected class. It also means that recognition as a “person with a disability” assumes more importance for purposes of affirmative action, because no analogous grounds operate.

5.3.3.3 Different enforcement and dispute resolution mechanisms

In an unfair discrimination claim, an aggrieved job applicant would either approach the CCMA to conciliate the dispute (if the EEA applies) or bring an unfair discrimination claim in the Equality Court with jurisdiction (if the PEPUDA applies). Within the scheme established by the EEA, if conciliation fails, any party to the dispute may refer it to the Labour Court for adjudication. Some employees who earn below a certain threshold may refer a dispute to the CCMA for arbitration, which is a more cost-effective option than the Labour Court.

The unfair discrimination dispute resolution mechanism is therefore reactive; there must be an allegation of direct or indirect discrimination against one or more employees. That does not mean that the duty only commences when the employer is presented with a disabled work seeker. The TAG require employers to examine their job advertisements, job profiles and the like to identify and remove barriers, which implies that the duty starts before an individual disabled job applicant appears on the scene. These duties flow from sections 5 and 6 of the EEA, regardless of whether their fulfillment would qualify as the provision of reasonable accommodation.

The judgment in *Singh v Minister of Justice and Constitutional Development and Others*⁵⁵⁰ raised, inter alia, the issue of the different positive duties that may apply in recruitment and selection. The Equality Court held that the failure to consider the applicant’s gender and/ or disability was unfairly discriminatory. It therefore ordered the respondents to reconsider the shortlisting for the relevant posts and the

⁵⁴⁹ See Ngweni ‘Legal Deconstruction’ 124.

⁵⁵⁰ 2013 (3) SA 66 (EqC).

applicant's application in light of her gender, disability and other relevant factors.⁵⁵¹ Furthermore, the respondents were ordered to revise selection criteria so that not only race and gender, but also disability, will be relevant in the appointment of magistrates.⁵⁵² Finally, the Court gave the respondents ten months within which to "make a formal and comprehensive statement of policies and criteria to be used and/or applied in short-listing, evaluation and appointment for positions as Magistrates which policies and criteria must clearly mention that the provisions of section 174 (2) and section 9 of the Constitution will be taken into consideration in the short-listing and the filling of the posts."⁵⁵³

The respondents sought to justify their failure to mention disability in their selection criteria on the basis that s 174(2) of the Constitution requires that the judiciary broadly reflects the racial and gender composition of South Africa and omits any mention of disability.⁵⁵⁴ Ledwaba J found this submission unpersuasive and reasoned that s 174(2) had to be read in the context of the Constitution as a whole as well as in the context of the PEPUDA.⁵⁵⁵ He emphasised s 9(3) of the Constitution, which prohibits the state from discriminating unfairly on the basis of disability.⁵⁵⁶ He also took into account s 4(2) of the PEPUDA, which enjoins those applying the Act to take into account systemic discrimination and inequalities, "particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy."⁵⁵⁷ Finally, he considered South Africa's international obligations and noted that the CRPD requires active measures to promote the employment of disabled people.⁵⁵⁸ In light of these factors, he found that the Constitution and the PEPUDA impose a positive duty on the state to promote the employment of disabled people.⁵⁵⁹

⁵⁵¹ At para 1.

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ See paras 20-22.

⁵⁵⁵ At para 26.

⁵⁵⁶ At paras 26-27.

⁵⁵⁷ At para 15.

⁵⁵⁸ At paras 34-36, 40.

⁵⁵⁹ At paras 47-50.

If a designated employer fails to make reasonable accommodation part of its affirmative action plans, an aggrieved individual has to rely on the dispute-resolution mechanisms provided for in Chapter 3 of the EEA. In terms of this scheme, the relevant employer's failure to comply with its duties under the EEA are enforced through an administrative system of compliance orders issued by labour inspectors,⁵⁶⁰ requests⁵⁶¹ or recommendations⁵⁶² by the Director-General of Labour and, eventually, hefty fines.⁵⁶³ Importantly, unless these remedies have been exhausted, no recourse can be had to a court of law or a labour tribunal, such as the CCMA, to resolve the dispute.⁵⁶⁴

⁵⁶⁰ The powers and functions of labour inspectors are set out in ss 35-38 of the EEA. One of these powers is to issue compliance orders against defaulting employers. In terms of s 37(6), the Director-General may apply to the Labour Court to have a compliance order made an order of that Court.

⁵⁶¹ Section 43 empowers the Director-General to review an employer's compliance with the EEA. Subsection (2) provides that in order to effect this review, the Director-General: "(a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan; (b) request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer's compliance with this Act; (c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act; or (d) request a meeting with any—

- (i) employee or trade union consulted in terms of section 16;
- (ii) workplace forum; or
- (iii) other person who may have information relevant to the review."

⁵⁶² Section 44 provides for the Director-General to either approve a designated employer's employment equity plan or to recommend, in writing, the steps an employer must take in relation to the plan, its implementation or in relation to the employer's compliance with the EEA. Any other prescribed information may be included in the recommendation.

⁵⁶³ The amounts of the fines are specified in Schedule 4 to the EEA. These fines, though heavy in monetary terms, are a last resort after repeated failures to comply and they may be applied for at the discretion of the Director-General. Section 45 provides that if an employer fails to act on a request or recommendation of the Director-General, the latter may apply to the Labour Court for an order directing the employer to comply with the request or recommendation. As an alternative, if the employer fails to justify its failure to comply, the Director-General may request that the Labour Court impose a fine on that employer.

⁵⁶⁴ There are two conflicting judgments at the Labour Court level on whether a person aggrieved by an employer's failure to implement affirmative action is allowed to institute an unfair discrimination claim. In *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC), Waglay J held that such an individual action is possible. However, Tip J, in *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC) reached the opposite conclusion, holding that the dispute resolution mechanisms are the only vehicle through which to enforce an employer's affirmative action duties and that the legislature never intended for there to be individual remedies for aggrieved persons. On appeal (*Dudley v City of Cape Town and Another* [2008] 12 BLLR 1155 (LAC)), the Labour Appeal Court elected not to pronounce on whether an individual action is ruled out completely in these circumstances, but held that the administrative dispute resolution mechanisms have to be exhausted before individual claims are pursued.

In sum then, the non-discrimination duties apply to a wider class of duty bearers, encompass a broader class of beneficiaries and the dispute resolution mechanisms are available to individuals through the CCMA, the Labour Court or the Equality Court. These forums are empowered to award proactive remedies⁵⁶⁵ as well as reactive remedies suited to individual complainants.

5.3.3.4 The role of affirmative action measures and their interrelationship with positive non-discrimination measures

In light of the availability of positive non-discrimination measures and their relative advantages over their affirmative action counterparts, questions arise as to the utility and role of positive duties as affirmative action measures. Ngwenya cites two reasons for omitting affirmative action from his scheme for transformational equality⁵⁶⁶. First, he argues that affirmative action would only benefit some disabled people while leaving intact exclusionary structural arrangements.

In his own words,

“The aim is to ensure the inclusion of disabled people as an entire class in an egalitarian universe of equality so that they can, as of right, be recognised and participate in society at a level of parity with other groups. An underpinning premise in this discourse is that equality as a right ought to be sufficiently responsive to remedying the subordinated status of all protected groups through treating lack of accommodation as a form of unfair discrimination. Affirmative action with its focus on advancing remedies that tweak the outcomes of attitudinal discrimination but leaving structural inequality intact and its modus operandi of only privileging the lucky few decidedly detracts from the main premise of this study.”⁵⁶⁷

⁵⁶⁵ Holness and Rule 1918 note that generous standing provisions, as well as the systemic remedies in the PEPUDA, are potentially groundbreaking in that these remedies could lead to structural changes. See 4.2.4 for the potential remedies to be awarded in terms of the PEPUDA.

⁵⁶⁶ Ngwenya ‘Search for Equality’ 98.

⁵⁶⁷ Ibid.

The second reason relates to his view that affirmative action incurs costs that paradoxically undermine the values and goals that it seeks to promote.⁵⁶⁸ For him, affirmative action reifies group identities, privileges some groups at the expense of others and oversimplifies equality claims. It therefore risks oversimplifying equality and freezing, rather than doing away with, antagonism. The better route, he reasons, is to link economic recognition to need rather than group association.

The approach I take to affirmative action and disability is different. In my view, neither affirmative action nor positive non-discrimination duties by themselves are sufficient to create and sustain transformative equality. This is because both types of duty have strengths and weaknesses. Moseneke J, in *Barnard*, reminded us that “restitution measures, important as they are, cannot do all the work to advance social equity.”⁵⁶⁹ Positive non-discrimination duties are not a cure on their own, either.⁵⁷⁰

As Fredman notes, unfair discrimination claims are reactive, dispute resolution takes its toll on individuals in terms of time, human and financial resources and progress is generally ad hoc.⁵⁷¹ Furthermore, labour tribunals and courts have taken a conservative approach to the imposition of positive non-discrimination duties.⁵⁷² This may stem from normative commitments that eschew the imposition of positive duties on non-state actors in order to vindicate social rights.⁵⁷³ It also ties in with conceptions of rights as shields against state interference, rather than social mechanisms that allow the state to regulate marginalised groups’ access to social goods.

The fact that affirmative duties require designated employers to identify and remove employment barriers and provide reasonable accommodation allows for the creation of structures and processes that might not otherwise be fashioned. In this way, it is

⁵⁶⁸ Ibid.

⁵⁶⁹ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 33.

⁵⁷⁰ In *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) 477F, Van der Westhuizen J stated: “[T]he recognition of substantive equality means, *inter alia*, that equality is more than mere non-discrimination.” Perhaps this was not meant to include positive non-discrimination duties, but even inclusive of such duties, I argue that non-discrimination alone is insufficient.

⁵⁷¹ Fredman ‘Changing the Norm’ 372.

⁵⁷² E Fergus and D Collier. “Race and Gender Equality at Work: The Role of the Judiciary in Promoting Workplace Transformation.” (2014) 30(3) *South African Journal on Human Rights* 484 at 486.

⁵⁷³ See 3.2.2.

reflective of an overall constitutional and legislative framework that recognises non-discrimination and affirmative action as mutually supportive mechanisms.⁵⁷⁴ In my view, this integrated approach calls for strategies that combine the two mechanisms in ways that promote substantive equality. I therefore part ways with Ngwena's approach and disagree with his claim that affirmative action is "philosophically and strategically peripheral" to the achievement of sustainable transformative equality for disabled people.⁵⁷⁵

With regard to the second strand of Ngwena's argument, I concede that affirmative action risks reifying exclusionary group identities, particularly if implemented in ways that only emphasise superficial representation by numbers.⁵⁷⁶ The Constitutional Court has recognised that group-based restitutionary measures are in tension with the individual rights of members of non-designated groups.⁵⁷⁷ The EEA itself

⁵⁷⁴ Moseneke J in *Van Heerden* (at para 32) stated: "Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)."

⁵⁷⁵ Ngwena 'Search for Equality' 100.

⁵⁷⁶ In *Bamard*, the various judges warned against treating restitutionary measures as ends in themselves (at para 30), against an over-emphasis on race as a yardstick when disadvantage is much more complex (para 80) and against a superficial focus on representativity (at para 149). Ngwena bases his arguments on Nancy Fraser's criticism of affirmative action (see Ngwena 'Search for Equality' 99 fn 361), which includes that it attends to surface allocations without disrupting systemic inequality, that it unintentionally marks beneficiaries as deficient and always in need of more allocations and that it fails to achieve recognition that is transformational because it emphasises differentiation without destabilising master dichotomies on, for example, race and gender. It is not possible to engage fully with these arguments here, save to note that while they have merit, it does not follow that these weaknesses render affirmative action negligible or unable to play some role in transformative endeavours.

⁵⁷⁷ Ngcobo J (as he then was) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 76 specifically acknowledged the difficulties transformative practices may occasion: "The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution."

The Constitutional Court in *Van Heerden* (at para 37) set three requirements for constitutionally valid restitutionary measures: "The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality." The third requirement clearly would take into account the effect of the measure on the overall vision of substantive equality. Indeed, Moseneke J expands on this requirement by stating (at para 44) that a remedial measure "should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened." In *Bamard*, all three judgments recognised the tensions between the social goal of restitution and the effects it might have on individuals who are members of non-designated groups (see *South African Police Service v*

implicitly acknowledges this tension and seeks to mediate it by prohibiting quotas and any other measures that would constitute an absolute bar to the advancement of non-designated groups.⁵⁷⁸

These difficulties and risks are complex and it is not possible to discuss them in any great depth here. For present purposes, I proceed from the premise that these challenges do not strip affirmative action of utility. I assume – driven as much by inconclusive views on the advantages and disadvantages of affirmative action as by pragmatism – that it can offer recognition to disadvantaged groups without unduly harming members of privileged groups⁵⁷⁹ and that it can curb still-rampant privilege linked to membership of groups advantaged by unfair discrimination.⁵⁸⁰

My choice to engage with affirmative action also flows from my view that if we do not fashion it in ways that link it to structural, substantive equality, it *will* only operate in the realm of superficial identity politics. That does not have to be the case. My primary interest in affirmative action duties in the present context is their potential to create spaces in which structural barriers to the employment of disadvantaged groups can be identified and addressed, as well as their potential to compel the

Solidarity obo Bamard 2014 (6) SA 123 (CC) paras 30-32 (per Moseneke J), paras 93-94 (per Cameron J, Froneman J and Majiedt AJ) and paras 178-179 (per Van der Westhuizen J)).

⁵⁷⁸ Sections 15(3) and (4).

⁵⁷⁹ As Mokgoro J points out in *Van Heerden* (at para 76), “The reason for the enactment of section 9(2) is to authorise restitutionary measures for the advancement of those previously disadvantaged by unfair discrimination. Whenever a group is given certain advantages it must follow that it receives more than others in the context of the particular measure which is being enacted. But the measure will not necessarily be enacted with the aim of taking from one group to give to another. [...] It would be contrary to the spirit of section 9(2) and inimical to its purpose to require the state to show that it has insufficient resources to give advantages equally, every time that it attempts to enact a restitutionary measure which advances those previously disadvantaged.”

⁵⁸⁰ See Silvers ‘Protection or Privilege’ 562, who argues that a distinction must be drawn between restitutionary measures that seeks to share privilege and those that seek to shift privilege: “Sharing recognition, rather than shifting it, is fair to both previously well recognized and previously misrecognized groups. Only sharing recognition diminishes both the majority's and the minority's exposure to misrecognition. Sharing recognition means that previously privileged workers may lose their privilege, but no others gain it. Nor are previously privileged workers now transformed into ‘others’ who are distanced from preferment. Their situation is worsened only in the very attenuated sense that expansions of workforce recognition may enlarge the numbers of individuals with whom they compete. These two strategies incur different kinds of losses for members of majority groups. Shifting recognition does not cure disparities in opportunity. Instead, previously privileged majority workers lose their privilege to previously misrecognized minority workers, who will now enjoy the privilege the majority has lost [emphasis in original].” This distinction between sharing privilege and shifting privilege is arguably what has to be borne in mind when considering the validity of affirmative action measures. How to go about doing that in individual cases, particularly where disability is concerned, is an important issue, but falls beyond the scope of the discussion here.

collection and administration of employment statistics for disabled people and other disadvantaged groups.

As I will discuss below, there are weaknesses in the current affirmative action framework that stymie its potential to contribute more meaningfully. However, my starting point is that, in principle, affirmative action, coupled with positive non-discrimination duties, can be of strategic value in endeavours to improve access to employment for disabled people.

Let us then consider what affirmative action duties have to offer. Affirmative action measures are defined in the EEA as those “designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.”⁵⁸¹ As noted before, it includes the duty to identify and remove employment barriers that adversely affect Black people, women and people with disabilities. It also specifically includes reasonable accommodation. These two duties, I argue, overlap considerably with the positive non-discrimination duties recognised in s 5 of the EEA as well as in s 14 of the PEPUDA.

Apart from the two duties already mentioned, affirmative action may also include measures to further diversity based on equal dignity and respect; measures to ensure that Black people, women and disabled persons are represented at all occupational levels and to retain and develop such persons through, inter alia, training programmes.⁵⁸² As mentioned above, the EEA endorses preferential treatment and the setting of numerical goals to ensure equitable representation of people from the designated groups, but it explicitly prohibits quotas.⁵⁸³ It also protects members of non-designated groups in that no affirmative action measure may erect “an absolute barrier” to their prospective or continued employment or to their advancement.⁵⁸⁴

⁵⁸¹ Section 15(1).

⁵⁸² Section 15(2).

⁵⁸³ Section 15(3).

⁵⁸⁴ Section 15(4).

As briefly outlined above, the monitoring and enforcement mechanisms that the EEA foresees are administrative in nature. An employee or trade union representative may bring any contraventions of the EEA to the notice of other employees, the employer, a labour inspector, a workplace forum, the Director-General of Labour, a trade union or the CEE.⁵⁸⁵ This is a monitoring mechanism that appears to encourage firm-specific consultations on and solutions to difficulties as a first step.⁵⁸⁶ Furthermore, the EEA requires all designated employers to “prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer’s workforce.”⁵⁸⁷ In *Gordon v Department of Health: KwaZulu-Natal*,⁵⁸⁸ the Supreme Court of Appeal held that the appointment of a Black male candidate in the absence of an employment equity plan was inherently irrational and arbitrary. Mlambo J stated the following in the course of judgment:

“The injunction that the public service must be broadly representative is an important one. It enjoins those in charge to strive towards representativity. This in my view calls for attention to be focused on the respects in which the service is not representative and what measures should be implemented to achieve the required representativity. This suggests that a properly considered policy or plan to address the situation as opposed to ad hoc means is the way to go to achieve representativity. It must therefore be so that ad hoc and random action is impermissible.”⁵⁸⁹

In *Stone v South African Police Service*,⁵⁹⁰ the South African Police Service had acted in terms of an employment equity plan when it preferred to appoint a Black male instead of his White counterpart. However, this employment equity plan had not been submitted to and approved by the Department of Labour at the relevant times.⁵⁹¹ The Labour Court held that *Gordon* was not authority for the proposition that only measures in terms of employment equity plans that had been submitted to

⁵⁸⁵ Section 34 of the EEA.

⁵⁸⁶ J Grogan. *Workplace Law*. (2014) 142.

⁵⁸⁷ Section 20. See, also, *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 40, in which Moseneke ACJ (as he then was) seems to interpret s 20 as being peremptory.

⁵⁸⁸ (2008) 29 ILJ 2535 (SCA).

⁵⁸⁹ At para 23.

⁵⁹⁰ [2013] 1 BLLR 70 (LC).

⁵⁹¹ At para 13.

and approved by the Department of Labour were valid. In my view, this was the ratio of the decision in *Stone* and not, as Grogan appears to suggest,⁵⁹² that a plan is not a prerequisite for valid affirmative action measures.⁵⁹³

It therefore seems that designated employers, at least in theory, would be required to act more proactively in making reasonable accommodation part of an employment equity plan. The enforcement structures and mechanisms, if implemented effectively, lend themselves to examinations of employment barriers faced by disabled people and how to go about removing these barriers. It falls beyond the scope of this work to discuss these structures and mechanisms extensively. However, some salient features will be mentioned in order to illustrate how these compulsory structures offer opportunities for building capacity to comply with both affirmative action and positive non-discrimination duties.

Firstly, a senior manager has to be appointed to drive affirmative action, which aims to ensure buy-in from top management.⁵⁹⁴ There is also a requirement of consultation between employers and representative unions or employee representatives.⁵⁹⁵ Every effort should be made to include persons from designated and non-designated groups.⁵⁹⁶ The manner and form of consultations are not prescribed, but Klinck usefully summarises the content of consultation that flows from guidelines that are not legally binding, as well as from the EEA itself:

⁵⁹² Grogan 141 fn 12.

⁵⁹³ At para 31 LaGrange J stated: “[I]n *Gordon’s* case, the provincial health department had no plan or policy of affirmative action, and the successful candidate was appointed simply on the basis that his appointment would promote representivity. The SCA held that his appointment could not constitute a policy or practice “*designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms* [emphasis in the original]”, which was a precondition for defending an appointment on the basis of race prior to the EEA. **But nowhere in the SCA decision did the Court say that only an employment equity plan which had been approved by the Department of Labour in terms of the EEA could provide a defence to an unfair discrimination claim** [footnotes omitted and bold emphasis added].” He then went on to quote s 6(2) and s 2 of the EEA and noted (at para 33): “Nowhere in these provisions is it suggested that only affirmative action measures approved by the Department of Labour in terms of the EEA could provide a defence to an unfair discrimination claim.”

⁵⁹⁴ S 24(1) of the EEA; Item 7.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (GNR 1394 of 23 November 1999) (hereinafter referred to as “Code of Good Practice: EE Plans”) <http://www.labour.gov.za/DOL/legislation/codes-of-good-practice/employment-equity/code-of-good-practice-on-employment-equity-plans> (Accessed: 6 February 2015).

⁵⁹⁵ S 16 of the EEA; Item 7.2.8 of the Code of Good Practice: EE Plans.

⁵⁹⁶ Item 7.2.6 read with Item 7.2.8 of the Code of Good Practice: EE Plans.

- “the training of representatives on the Employment Equity Act;
- regular communication between representatives and their constituencies, including reasonable opportunity to meet and report back to employees and management;
- regular communication between the consultative forum and employees not directly or indirectly involved in any of the processes;
- disclosure of all relevant information by the parties to the consultation and the employer in terms of section 18 of the Employment Equity Act, including information from the employer that elucidates its reasons for proposing certain affirmative action programmes or measures. On the other hand, employers have to duly consider the proposals and viewpoints of parties to the process; and
- adequate time for all of the above, including regular meetings.”⁵⁹⁷

Consultation needs to take place on the workplace analyses, the preparation and implementation of the employment equity plan and the employment equity report to be submitted to the Department of Labour.

These structures and mechanisms are part of proactive equality strategies, as conceptualised by Fredman.⁵⁹⁸ The advantages of proactive strategies include the following: (i) the persons who are expected to effect change – policymakers, implementers, service providers and the like – are expected to take initiative; (ii) individual complainants do not have to take on the financial, emotional and other burdens of litigation; and (iii) change occurs through systematic means rather than in an ad hoc manner.⁵⁹⁹

However, proactive strategies pose challenges of their own. Fredman notes that such measures often confuse means and ends and pay inadequate attention to the

⁵⁹⁷ ME Klinck. Employment Equity Plans. In: JL Pretorius, ME Klinck and CG Ngweni (eds). *Employment Equity Law*. (2014) 10-3 at 10-14(1).

⁵⁹⁸ Fredman ‘Changing the Norm’ 373. She identifies two types of proactive strategies (at 374): the first is ‘mainstreaming’, which involves infusing equality principles, strategies and practices into the policies and day-to-day activities of organisations. The second category is more specific and is effected through the imposition of statutory duties on public bodies to promote equality.

⁵⁹⁹ Ibid.

goals to be achieved.⁶⁰⁰ This weakness can be ameliorated if the interrelationship between reactive and proactive strategies is highlighted and utilised. Unfair discrimination cases require courts and labour tribunals to frame normative principles, which in turn could animate proactive norm-setting.

Now that we have considered the scope, nature and interrelationship between the various duties, we can turn our attention to the content of reasonable accommodation duties and how such duties are circumscribed. Given the scope of this thesis, the emphasis will fall on the role of reasonable accommodation in recruitment and selection. It is, however, not wise to completely separate the different stages of the employment process, as systemic disadvantages in one part of the system, for example, retention, may affect other parts, such as recruitment and selection. As discussed above,⁶⁰¹ this effect may not even be internal to one employer only, but may impact on how other employers view a disabled job applicant in subsequent applications for work.

5.4 Considerations in the implementation of reasonable accommodation

5.4.1 When accommodation is to be provided

The duty to accommodate is owed to job applicants and employees who are suitably qualified. The Disability Code foresees that accommodations may be required during recruitment and selection; in the work environment; in the way work is allocated, evaluated and rewarded; and in work benefits and privileges.⁶⁰² The TAG expand on this and alert employers to the fact that changes to the work, the work environment or the employee's impairment occur and that reasonable accommodation duties therefore have to be reviewed on a continuous basis.⁶⁰³

⁶⁰⁰ Fredman 'Changing the Norm' 375.

⁶⁰¹ See 5.2.1.

⁶⁰² Item 6.4.

⁶⁰³ Item 6.5. The examples that are given are when an employee tells her supervisor that she now only has the use of her left arm and is struggling to type high volumes of documents for a new work project and when someone has blocked the only wheelchair-accessible entrance to a wheelchair user's office.

The employer need not accommodate someone who cannot perform the essential functions of a job after reasonable accommodation has been provided.⁶⁰⁴ This is consistent with the defence in unfair discrimination cases that an employee or job applicant is unable to perform the inherent requirements of the job.⁶⁰⁵

The essential functions of the job are usually contained in the job description, which the TAG suggest should be indicated in the advertisement for positions.⁶⁰⁶ The Code of Good Practice on Integration of Employment Equity into Human Resource Policies and Practices requires that “each task or duty in the job description is essential to be able to perform the job and is not overstated.”⁶⁰⁷ Other criteria that may be relevant to protecting disabled applicants include the fact that competency specifications should be “objective and avoid subjective elements that can be interpreted differently”, that experience requirements must be essential and that job criteria must not “disadvantage employees from designated groups.”⁶⁰⁸

The TAG indicate that disabled applicants must be afforded opportunities to disclose their accommodation requirements voluntarily.⁶⁰⁹ Where it is self-evident that an applicant may require accommodations, the employer should enquire and reasonably respond to any relevant requests.⁶¹⁰ The TAG, however, warn that detailed information about accommodations must only be requested after it has been determined that applicants are suitably qualified and conditional job offers have been

⁶⁰⁴ TAG Item 6.2.

⁶⁰⁵ See s 6(2)(b) of the EEA, which provides that it is not unfair discrimination to “distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.” See, also, s 187(1)(f) and s 187(2)(a) of the LRA, which reads:

“(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is [...] (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility; [...]

(2) Despite subsection (1) (f) – (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job.”

⁶⁰⁶ Item 7.4.

⁶⁰⁷ South Africa. Department of Labour. *Code of Good Practice on Integration of Employment Equity into Human Resource Policies and Practices*. (2007) <http://www.labour.gov.za/DOL/legislation/codes-of-good-practice/employment-equity/code-of-good-practice-on-integration-of-employment-equity-into-human-resource-policies-and-practices> (Accessed: 6 February 2015) Item 6.

⁶⁰⁸ Ibid. Item 6.3.1 of the TAG also requires job specifications to be “drafted to ensure that they do not unnecessarily exclude people with disabilities.”

⁶⁰⁹ TAG Item 6.4.

⁶¹⁰ Ibid.

made. Only the information highlighted in Chapter 7 of the TAG, which mostly relates to the inherent requirements and the essential functions of the particular job and how the applicant will go about satisfying and performing these functions, is regarded as relevant.⁶¹¹ Detailed questions regarding potential accommodations before conditional job offers are made may lead to the inference that a candidate was not selected because the employer did not want to make reasonable accommodation.⁶¹²

The TAG offer general guidance on how to frame advertisements so that they are not unnecessarily exclusionary, on making interview venues accessible, on how interviewers should go about interacting with disabled persons and on how pre-employment skills assessments and testing must not be biased and must test for essential functions only.⁶¹³ Furthermore, these emphasise that other staff members must be sensitised and made aware of diversity.⁶¹⁴ They also encourage employers to consult disabled employees on those employees' career progression and

⁶¹¹ TAG 26-31. Ngweni (2014) notes that "essential functions" are used in the Disability Code in addition to the "inherent requirements of the job" to indicate what a disabled employee needs to be able to do, either with or without reasonable accommodation, in order to be appointable.

⁶¹² TAG Item 6.4.

⁶¹³ TAG Items 6.3 and 7.5. It is not possible to eliminate all biases, as some of these are held unconsciously and operate subtly. In this regard, see SR Bagenstos. "The Structural Turn and the Limits of Antidiscrimination Law." (2006) 94(1) *California Law Review* 1 at 5-10. See, also, A Rycroft. "Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies." (1999) 20 *Industrial Law Journal* 1411 at 1416, who notes that some institutions have adopted a method that is sometimes referred to as 'targeted selection'. This method aims to remove undue subjectivity from the selection process and requires the following:

"(a) the prior articulation of attributes or competencies sought in the applicant; (b) the weighting to be given to each attribute or competency; (c) the preparation of specific questions which relate directly to the chosen attributes and competencies and which are to be put to each applicant; (d) the private evaluation of each candidate by each member of the selection committee according to the agreed weighting; and (e) the totalling of scores to arrive at a rating or ranking of applicants."

Rycroft argues that without such a carefully recorded process, selection committees may experience difficulties in justifying their decisions.

⁶¹⁴ TAG Items 9.2 and 9.6. Muzi Nkosi, the Chief Executive Officer of Disability Indaba, an organisation that provides disability awareness training, has warned that the low level of understanding of disability as a human rights and development issue means that disabled people continue to be excluded from development processes despite the political will to effect change. He suggests that before the recruitment of disabled people even starts, all employees have to be sensitised to disability, the rationale for legislative interventions such as reasonable accommodation and affirmative action and other relevant issues. If this step is omitted, disabled people who are employed may find the workplace alienating, which may lead to low retention rates of disabled people. See M Nkosi. "Striving for Equality and Redress the Imbalances of the Past." (2012) <http://laylacassim.co.za/pdf/Muzi%20Nkosi%20-%20Striving%20for%20Equality.pdf> (Accessed: 6 February 2015).

objectives, including any training and other needs that they may have.⁶¹⁵

5.4.2 The inherent requirements of the job defence

The legislature has left it up to courts to decide the ambit of the 'inherent requirements' standard on the facts and in the circumstances of each case.⁶¹⁶ The 'inherent requirements' standard has been interpreted restrictively by courts in South Africa.⁶¹⁷ Dupper and Garbers explain that since the inherent requirements defence would constitute a limitation of the right to equality in the Constitution, it has to be interpreted restrictively.⁶¹⁸ This approach was accepted by the Labour Court in *IMATU*.⁶¹⁹

5.4.3 The interpretation of 'reasonable' and 'unjustifiable hardship' in circumscribing the duty

The term 'reasonable' could be interpreted to modify the accommodation itself, the duty on the duty bearer, or both.⁶²⁰ In some jurisdictions, courts and tribunals have interpreted 'reasonable' to mean that the accommodation must be 'appropriate' or 'effective'.⁶²¹ On this interpretation, 'reasonable' only modifies the accommodation itself. In other jurisdictions, 'reasonable' serves to delineate the duty imposed on the duty bearer, either by itself or in conjunction with a provision that an accommodation does not have to be made if it would result in undue or unjustifiable hardship for the duty bearer.⁶²²

The South African framework uses 'reasonable' to refer to a balancing exercise that is explained as follows in the TAG:

“On the one hand, this may involve identifying and determining the

⁶¹⁵ TAG Chapter 10.

⁶¹⁶ Grogan 126.

⁶¹⁷ Grogan 127. However, see the judgment of Willis JA in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) para 123.

⁶¹⁸ Dupper and Garbers 'Employment Discrimination' CC1-59.

⁶¹⁹ At para 101.

⁶²⁰ Waddington 'Reasonable Europeans' 322.

⁶²¹ Ibid.

⁶²² Mégret and Msipa 267.

effectiveness of the accommodation and, on the other, whether the implementation of such accommodation will create difficulty or expense that will seriously disrupt the operation of the business. The assessment should also take into account the impact of providing or failure to provide accommodation to the employee and the systemic patterns of inequality in society. The objectives of the Act and the Constitution should also be considered.”⁶²³

This weighing of various interests is in keeping with the approach adopted by the CRPD. In *HM v Sweden*,⁶²⁴ the first individual communication to be considered by the Committee, a two-stage process was used in balancing the interests of the disabled person and the duty bearer. The author of the petition had a chronic connective tissue disorder that, by the time of the petition, had confined her to her home.⁶²⁵ The Committee accepted that the only rehabilitation option that would be effective was hydrotherapy, which required the author to install a pool in her house for this purpose.⁶²⁶ She had requested planning permission from her local authority so that she could extend her house to accommodate the indoor pool, but her application was refused because the extension would have been in conflict with the City Development Plan.⁶²⁷ Various appeals ensued, but the original refusal was confirmed. The author then petitioned the Committee.

The two-stage approach to the reasonable accommodation inquiry first saw the Committee accepting the evidence that hydrotherapy would be the only effective rehabilitation option.⁶²⁸ It then considered whether the accommodation sought would impose a disproportionate or undue burden. In this regard, the Committee decided that the relevant legislation itself permitted departure from a City Development Plan, so it was possible to fashion reasonable accommodation measures that would allow people with disabilities “the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination.”⁶²⁹ The relevant State party had

⁶²³ TAG Item 6.12.

⁶²⁴ UN Committee on the Rights of Persons with Disabilities. *HM v Sweden*. (2012). <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD.C.7.D.3.2011.doc> (Accessed: 6 February 2015).

⁶²⁵ At paras 2.1 and 2.2.

⁶²⁶ At para 2.2.

⁶²⁷ At paras 2.3 – 2.7.

⁶²⁸ At para 8.5.

⁶²⁹ Ibid.

also not indicated that the accommodation would create a disproportionate or undue burden.⁶³⁰ The failure to accommodate the author was therefore “disproportionate and produced a discriminatory effect.”⁶³¹

5.4.4 The effectiveness of the accommodation

In respect of the effectiveness of the accommodation, a measure that is likely to remove all the disadvantage or difficulties experienced by a disabled employee is more likely to be found to be reasonable if the negative consequences for the business of the employer are not pronounced. However, doubts about the likely effectiveness of a measure do not automatically render it unreasonable.⁶³²

Some conditions are unpredictable and recur sporadically, so it may be difficult to predict the effectiveness of particular accommodations. The most obvious examples are psychosocial conditions such as depression and bipolar disorder. In *Beart v HM Prison Service*,⁶³³ an occupational health professional had recommended that an employee who suffered from depression be relocated to another prison after having difficulties with her line manager. The Court of Appeal noted that no doctor could have been certain that the relocation would cure the employee’s depression, but took into account that the relevant doctor thought that it could.⁶³⁴

⁶³⁰ Ibid.

⁶³¹ At para 8.8. The Committee went further and stated the following: “Accordingly, the Committee concludes that the author’s rights under articles 5(1), 5(3), 25 and the State Party’s obligations under article 26 of the Convention, read alone and in conjunction with articles 3 (b), (d), and (e), and 4(1) (d) of the Convention, have been violated.” At para 8.9 the Committee dealt with one of the consequences of the refusal to accommodate as follows: “The rejection of the author’s application for a building permit has deprived her of access to hydrotherapy, the only option that could support her living and inclusion in the community. The Committee therefore concludes that the author’s rights under article 19(b) of the Convention, have been violated.”

⁶³² *Beart v HM Prison Service* [2003] EWCA Civ 119

<http://www.bailii.org/ew/cases/EWCA/Civ/2003/119.html> (Accessed: 6 February 2015).

⁶³³ Ibid.

⁶³⁴ At para 43.

5.4.5 Unjustifiable hardship

The TAG emphasise that “unjustifiable hardship” is a stricter test for employers to meet than the “undue hardship” standard employed in some other jurisdictions.⁶³⁵ This stricter test is said to be grounded in an appreciation of the lack of employment and accommodation experienced by disabled persons in South Africa. Given the context-specific nature of the test, it seems that the application of whatever standard in particular situations, rather than what the standard is called, will be the primary factor in how narrowly or generously employers’ duties are interpreted. Be that as it may, the negative impact of the accommodation on the business of the employer is an important consideration in determining whether an accommodation would cause unjustifiable hardship to the business of the employer.

One negative impact is that the financial cost of an accommodation may be prohibitive for a particular employer at a particular time. This determination does not apply generally across employers and over disparate time periods.⁶³⁶ As the TAG note, “[d]isabilities or impairments, jobs, equipment and technology and work design are dynamic in nature.” Employers and employees therefore have to continuously monitor developments and make adjustments where needed and if such adjustments would not constitute an unjustifiable hardship.⁶³⁷

The cost of an accommodation has both a relative and an absolute dimension. The relative dimension requires the cost to be balanced against the effectiveness of the accommodation and the consequences of providing or failing to provide it. In *Pillay, Langa* CJ emphasised that reasonable accommodation may “incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally.”⁶³⁸ He went on to say that the difficult question is not whether positive action is necessary, but “how far the community must be expected to go to enable those outside the ‘mainstream’ to swim freely in its waters.”⁶³⁹

⁶³⁵ TAG Item 6.11.

⁶³⁶ TAG Item 6.13.

⁶³⁷ Ibid.

⁶³⁸ At para 73.

⁶³⁹ At para 76.

The cost also has an absolute dimension in the sense of inquiring whether a particular employer can afford an accommodation. Here the employer's position and circumstances are the focus. Some of the factors that would be relevant include: (i) the financial and human resources at the disposal of the employer; (ii) whether the employer is a public-sector or private-sector organisation; (iii) whether the employer is a large corporation or a small, medium or micro enterprise; and (iv) the nature of the employer's business.

Hardship does not only relate to financial cost. Although practical considerations will often have a financial dimension, the fact that the TAG refer to "difficulty *or* expense that will seriously disrupt the operation of the business"⁶⁴⁰ (emphasis added) indicates that difficulties need not relate to expense. Other forms of hardship may include adverse impacts on the day-to-day running of a business. An example may be if the entrance to a workspace where a job applicant who uses a wheelchair is due to work is partially blocked and the employer is unable to wait for however long it would take to remove the obstacle.⁶⁴¹

Another potential hardship would be if there would be unacceptable health and safety risks if an accommodation were to be made. Although *IMATU and Another v City of Cape Town*⁶⁴² was not a case in which a reasonable accommodation was sought, it does hold important guidelines on the use of risk assessments in deciding whether or not employing a person with a serious health condition or impairment would constitute an unacceptable risk. The City of Cape Town had refused to appoint Stuart Murdoch, the second applicant, as a firefighter because he was an insulin-dependent diabetic. Two occupational health specialists had considered Murdoch's health and fitness for duty, and despite recognising that his condition was optimally controlled and that he was physically fit, recommended that his application be refused.⁶⁴³ In their view, the risk of Murdoch suffering a hypoglycaemic attack while fighting fires may have eventuated in injury to himself, his colleagues, the public or the employer.⁶⁴⁴

⁶⁴⁰ Item 6.12.

⁶⁴¹ Lawson 83.

⁶⁴² (2005) 26 ILJ 1404 (LC).

⁶⁴³ At paras 11, 14 and 16.

⁶⁴⁴ Ibid.

The City of Cape Town had called a risk management expert to testify on the risk posed by employing an insulin-dependent diabetic as a firefighter. The Court summarised the salient aspects of his evidence as follows:

“He testified that it is impossible to use an exact numerical yardstick of measurement of probability in the case of an insulin dependent diabetic firefighter being injured at a firefighting incident as there can be no assessment prior to the event of the permutation of circumstances which could lead to a hypoglycaemia attack coupled with circumstances in which this could lead to severe injury or death. However, he relied on a riskrating tool, which applied numerical values to three factors: the probability of an incident where the event occurs (“likelihood”), the frequency of occurrence of the event (“exposure”) and the consequence. In assessing the risk of a severe hypo on the fire ground causing injury or death, Rowen pegged its likelihood as “conceivable, but very unlikely (hasn’t happened yet)” with a corresponding value of 0,5 out of 10; its exposure as “continuous” with a value of 10 out of 10; and its consequences as “very serious” with a value of 15 out of 100. This generated a risk score of 75 (0,5 x 10 x 15) leading to a risk classification of “substantial risk: correction needed”. This then required the removal of the risk and the best way to achieve that was a blanket ban on the employment of diabetics as firefighters.”⁶⁴⁵

The Court was not satisfied with this method of risk assessment.⁶⁴⁶ Murphy AJ noted that while this method may have been useful for purposes of business planning, it was not suitable for use in justifying discrimination that would infringe the dignity of a group of individuals. It relied too easily on generalised assumptions and, in Murdoch’s case, could not take account of critical factors such as his optimal control of his condition, his awareness of his blood sugar levels and his ability to adjust accordingly. Those factors, in the Court’s view, would have adjusted the risk rating considerably. Furthermore, there was other evidence that suggested that the risk was minimal.⁶⁴⁷

⁶⁴⁵ At para 70.

⁶⁴⁶ At para 71.

⁶⁴⁷ At para 72.

The Court reached the conclusion that the evidence, taken as a whole, indicated that diabetics such as Murdoch did run the real, albeit small, risk of developing hypoglycaemia. However, it was clear that the risk will vary from person to person, which is why the ILO Convention and policies in other parts of the world require individualised risk assessments and that a person's competence to perform the inherent requirements of a job not be based on stereotypes.⁶⁴⁸

The Court's assessment of the risks posed is commendable. It was greatly assisted by the evidence of one of the foremost medical experts on diabetes in the country.⁶⁴⁹ This expert's focus on the individual and what he or she is able to do was of great help, but it is notable that the two other medical experts who testified relied on generalised risk assessments without taking into account Mr Murdoch's individual traits and circumstances. While a discussion of the analysis of expert evidence by courts and labour tribunals falls beyond the scope of this work, it is important to note that the methods used by medical professionals in drawing conclusions on medical aspects of disability may be based on unwarranted generalisations.⁶⁵⁰

5.4.6 Some procedural aspects

Decisions on reasonable accommodation must be based on objective assessments of facts and circumstances.⁶⁵¹ In the *Lucas* case, the arbitrator had the following to

⁶⁴⁸ At paras 73-77.

⁶⁴⁹ At para 30, Murphy AJ noted that "the court had the benefit of the evidence of South Africa's leading authority on diabetes, Prof Bonnici, who is also an accredited expert internationally."

⁶⁵⁰ See M du Plessis and L Meintjes-Van der Walt. "Forensic Entomology: Relevant to Legal Dispute Resolution?" (2004) 29(3) *Journal for Juridical Science* 100 at 113-114 for a discussion on some aspects relating to the probative value of expert testimony. Of particular relevance is the following dictum of the Appellate Division (now the Supreme Court of Appeal) (per Wessels JA) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MbH* 1976 (3) SA 352 (A) 371F-G:

"[A]n expert's opinion represents his reasoned conclusion based on certain facts on *data*, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert [emphasis in the original]."

⁶⁵¹ TAG Item 6.12. For an application of this principle, see *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, in which a business which sold, inter alia, radiator cabinets, insisted that its sales representatives carry full-sized products with them when meeting potential clients. Mr Smith had applied for a position as a sales representative, but could not carry a full-sized cabinet due to his medical condition. The employer refused to adapt its sales strategy to allow Mr Smith to work with a

say about the process to be followed:

“It would seem that deciding what is reasonable depends on the circumstances of the workplace and the employee. The employer and the employee should adopt a collaborative problem-solving approach to modify employment practices to give the employee with the disability opportunities for job performance that would be similar, if not equal to a similarly situated employee who does not have any disabilities. How much and what kind of adjustments are “reasonable” is difficult to determine. [...] The goal is ultimately to facilitate greater retention and employment for people with disabilities. Of course one would have to consider the extent, the purpose, arrangements of the accommodation and the employer’s resources.”⁶⁵²

The employer should consult the employee and, where necessary, technical experts. In *Ferreira*, the Labour Court held that the failure by a big retail bank to refer the employee to an occupational therapist was unreasonable.⁶⁵³ The employer would have been better able to assess the possibilities for accommodation had an expert assessment been made.

Consultations between the disabled employee, the employer and any technical experts have to take place in good faith and the employee must be made aware of the role of external role players. In *Lucas*, Christie A found that it was not objectively justifiable for the employee to have refused to submit to an assessment by an occupational therapist, but that the employee had reasonably formed the impression that such an assessment was not directed at her retention, but at her dismissal.⁶⁵⁴ The consultative nature of the process was also evident in that the arbitrator held that Mrs Lucas could correct what she viewed as factual errors in the occupational

smaller model of the cabinet and withdrew the offer of sending him on a training course after he had passed the interview stage. The Court held (at paras 44, 45 and 50) that in the determination of reasonableness the fact that an employer “held a view that was genuine, relevant to the circumstances and which provided a more than insignificant reason for the treatment” did not preclude a court or tribunal from holding that the employer should nevertheless have made the adjustment.

⁶⁵² *National Education Health and Allied Workers’ Union (NEHAWU) obo Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA) 2103C-E.

⁶⁵³ *Ferreira and Standard Bank of SA* (2006) 27 ILJ 1547 (CCMA) para 46.

⁶⁵⁴ *National Education Health and Allied Workers’ Union (NEHAWU) obo Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA) para 44.

therapist's report.⁶⁵⁵ However, she could not request that the occupational therapist change her findings and recommendations.⁶⁵⁶

5.5 Positive duties, social understandings of disability and substantive equality

Reasonable accommodation has clearly been accorded a central place in the legal framework that seeks to contribute to substantive equality. It is a definite step forward in the realisation of substantive equality, because it proceeds from the starting point that unequal treatment may sometimes be necessary to show equal respect and concern. It aids in the construction of difference as a positive aspect of society in that it encourages the inclusion of people who may have to go about achieving work tasks in different ways. It also encourages decision-makers not to rely on stereotypes about disabled people, because it requires an individualised assessment of an employee's abilities and requirements for accommodation. In terms of process, the required consultations with disabled people regarding accommodations that may be necessary will contribute towards awareness raising, which may in turn influence more people's understanding of disability as social oppression and lead to reflections on how the environment and social processes can be made to be more inclusive.

However, such a context-specific remedy brings its own challenges. There are various aspects inherent to reasonable accommodation as a measure, as well as aspects related to its implementation and enforcement, that place constraints on its potential to contribute to substantive equality in the recruitment and selection of disabled people.

The first class of constraints operates because reasonable accommodation is individualised. It requires the appearance of a specific employee whose situation

⁶⁵⁵ At para 47.

⁶⁵⁶ Ibid.

has to be assessed and whose needs must be balanced against those of the employer. Complex, process-driven change initiated and sustained by managers at all levels and colleagues who do not view difference as inherently negative or substantive equality as the privileging of marginalised persons or groups, are required.

I will argue here that various aspects of reasonable accommodation and how it is implemented and enforced in South Africa constrain its ability to contribute to substantive equality. Each of these is subsequently discussed in more detail. Firstly, disability is not constructed as social oppression, which weakens the impetus to change workplaces from the outset. Secondly, the command-and-control approach to regulation under the EEA means that attitudinal barriers are not addressed, and that insufficient financial and human resources are available to create and sustain the complex processes required for transformative change.

Thirdly, reasonable accommodation and its focus on individualised solutions has the potential to be applied in ways that allow particular disabled individuals to participate without addressing the structural norms that caused the exclusion in the first place. Fourthly, reasonable accommodation processes may become oppressive if they privilege medical power and authority at the expense of disabled people's experiences. Finally, there may be ways in which applicants for employment who require accommodation are at a relative disadvantage to existing employees who require accommodation.

5.5.1 Failure to construct disability as social oppression

Within contemporary South African social relations, race and, to a lesser extent, gender, are associated with oppression. Individual, medicalised conceptions of disability predominate.⁶⁵⁷ Unfortunately, this hegemony of individual conceptions persists in the TAG.

⁶⁵⁷ See 4.4.4.1.

Throughout the TAG, the examples that are used to frame the situation in which reasonable accommodation has to be provided emphasise people's impairments rather than how the environment or social processes are not suited to accommodate these. The following is an example of what appears:

"Situation

A call centre consultant with a physical disability has difficulty typing with his/her hands at great speed.

Solution

At minimal cost to the employer, the consultant is allowed to type with a mouth stick or use voice input/output depending on preference, both of which allow the consultant to fall within the acceptable typing speed range."⁶⁵⁸

If a social understanding of disability had been employed, the focus of the situational analysis would have been that the typing facilities were not amenable to use by people who do not type optimally with their fingers or that the targets may have been unreasonable. Abberley makes a similar point when he objects to how questions regarding the prevalence and nature of disabilities are framed in many censuses and surveys.⁶⁵⁹ He uses the following illustrations from a survey conducted in England, Wales and Scotland. The questions reflect an individual, medical conception of disability:

- "1) What complaint causes you difficulty in holding, gripping or turning things?
- 2) Do you have a scar, blemish or deformity which limits your daily activities?
- 3) Have you attended a special school because of a long-term health problem or disability?
- 4) Does your health problem/ disability affect your work in any way at present?"⁶⁶⁰

⁶⁵⁸ TAG Item 6.1.

⁶⁵⁹ Abberley 'Significance of Work' 4.

⁶⁶⁰ Abberley 'Significance of Work' 3.

Abberley then formulates the same questions from the perspective of the social model of disability:

“1a) What defects in the design of everyday equipment like jars, bottles and lids causes you difficulty in holding, gripping or turning them?

2a) Do other people’s reactions to any scar, blemish or deformity you may have limit your daily activities?

3a) Have you attended a special school because of your education authority’s policy of sending people with your long-term health problem or disability to such places?

4a) Do you have problems at work as a result of the physical environment or the attitudes of others?”⁶⁶¹

The focus in the second set of questions is on how environmental and attitudinal barriers, sometimes in conjunction with a person’s personal characteristics, disable them.

As discussed above, locating disability in the individual rather than in social processes and physical environments absolves dominant groups from responsibility. As Minow points out, locating difference in social relations means that disadvantage flowing from such difference “becomes a problem of social choice and meaning, a problem for which all onlookers are responsible.”⁶⁶² In the realm of reasonable accommodation, if the starting point is that the job applicant’s impairment is the ‘situation’, it is easier for those who bear reasonable accommodation duties to view them as ‘favours’ to disabled people.

This starting point is at odds with a view of accommodation for disabled people as one way in which to adapt society so that more people can participate. As Langa CJ pointed out in the *Pillay* case, “[d]isabled people are often unable to access or participate in public or private life because the means to do so are designed for able-bodied people.”⁶⁶³ Workplaces are structured in ways that facilitate performance by

⁶⁶¹ Ibid.

⁶⁶² Minow ‘Making All the Difference’ 119.

⁶⁶³ *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 74.

people without disabilities;⁶⁶⁴ in that sense, choices have been made to accommodate people without disabilities. That basic premise, I submit, is the one that ought to permeate the TAG. Unfortunately, in terms of explaining the circumstances that may warrant accommodation, the TAG reverts to individual understandings of disability and blunts appreciation of disability as social oppression.

5.5.2 Proactive duties, but reactive, command-and-control enforcement

The positive duties in the EEA are proactive to some extent, but a major weakness lies in the enforcement of the duties, including reasonable accommodation. Hepple argues that a paradox of many transformative equality schemes is that “while one of the main aims of such schemes is to increase the participation of disadvantaged groups in institutions, the introduction and implementation of the schemes only rarely involve the active participation of those groups.”⁶⁶⁵ As a result, the holders of power design schemes that rely on top-down, command-and-control enforcement mechanisms.⁶⁶⁶

He cites two theoretical reasons for what he terms the failure of transformative equality schemes that rely on top-down enforcement.⁶⁶⁷ Firstly, they interfere with rights to private property, which most holders of power resist, and do not pay attention to mediating the tensions between substantive equality and private property. Secondly, transformative equality schemes rely on law to effect social change, but are underpinned by a hierarchical view of society with law at the top.

The EEA, unfortunately, illustrates these weaknesses. The emphasis here is not on the regulatory scheme, so an extensive discussion thereof will not be done.

⁶⁶⁴ JO Cooper. “Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act.” (1991) 139(5) *University of Pennsylvania Law Review* 1423 at 1430.

⁶⁶⁵ B Hepple. “Transformative Equality: The Role of Democratic Participation.” (2013). www.upf.edu/gredtiss/pdf/2013-LLRNConf_SirBobHepple.pdf (Accessed: 6 February 2015) (hereinafter referred to as “Hepple ‘Transformative Equality’”) 1-2.

⁶⁶⁶ Hepple ‘Transformative Equality’ 2.

⁶⁶⁷ Hepple ‘Transformative Equality’ 4 and 7.

However, one example that lies at the heart of the first weakness identified by Hepple will be used. This is the TAG's approach to the costs of reasonable accommodation to employers.

These guidelines state:

“Although employers are not required to provide accommodation that poses an ‘unjustifiable hardship’, it is a well-known fact that employing the wrong person for the job results in greater expense in the long run. Employers often report that the benefits to employing people with disabilities often outweigh the cost of reasonable accommodation.”⁶⁶⁸

The “well-known fact” that job mismatching leads to greater costs is not referenced or explained. There is no explanation of how “employing the wrong person for the job” is relevant to providing reasonable accommodation. There may be other applicants without disabilities who are also “right” for the job and, as some law and economics scholars in the US have pointed out, it would be perfectly rational for employers to want to minimise costs in their organisation in the short term.⁶⁶⁹

The rationale for employers having to bear costs is not linked to the systemic oppression of disabled people and how employers are implicated in redistribution. Instead, a weak case regarding the instrumental value of employing disabled people is proffered. Various critiques have been leveled against the use of the business case for ensuring redistribution. Nkomo, for example, writes in the context of affirmative action as applied in two South African organisations:

“[I]nstrumental positioning of diversity (i.e. as competitive advantage) may result in diluting the value of diversity because inclusion often requires assimilation to organisational priorities. Indeed, black, coloured, and Indian

⁶⁶⁸ TAG Item 6.14.1.

⁶⁶⁹ See 5.2.1.

employees were valued as long as they fitted into the existing organisational culture. A very instrumental orientation may also lead to a neglect of social justice whose main goal is to redress inequalities between dominant and oppressed groups.”⁶⁷⁰

It may be strategically beneficial to emphasise the instrumental value of diversity. However, if this aspect is over-emphasised, it may inhibit changes to assimilationist, oppressive norms. A culture may develop in which organisations use diversity to their benefit when it is expedient to do so, but without centering social justice concerns or the rights of marginalised groups.

Hepple⁶⁷¹ has advocated for the use of ‘reflexive regulation’, which differs from a command-and-control approach in that it seeks to tap into the motivations, customs and structures of those who are regulated.⁶⁷² In a reflexive scheme, incentives are provided for organisations to self-reflect and to engage with interest groups. The state or enforcement agency provides information and advice and negotiates change. Deterrent sanctions are used as a last resort. If one assesses the EEA’s scheme for enforcing positive duties against these characteristics of ‘reflexive regulation’, some of its shortcomings are emphasised.

5.5.3 Limitations in enforcement

The EEA and the Code of Good Practice: EE Plans do not expand on the details of the consultative processes required. Although there is limited empirical information

⁶⁷⁰ S Nkomo. “Moving from the Letter of the Law to the Spirit of the Law: The Challenges of Realising the Intent of Employment Equity and Affirmative Action.” (2011) 77(1) *Transformation: Critical Perspectives on Southern Africa* 122 at 131.

⁶⁷¹ Hepple ‘Transformative Equality’ 12.

⁶⁷² On such an approach, the reasons why businesses may not hire people with disabilities will be examined and strategies to address these barriers will underpin the regulatory response. See, for example, B Peck and LT Kirkbride. “Why Businesses Don’t Employ People with Disabilities.” (2001) 16(2) *Journal of Vocational Rehabilitation* 71. These authors consider fears that may prevent employers from hiring people with disabilities, such as fears over unknown costs of hiring disabled persons, fears that disabled employees may require additional supervision and that this may have an adverse impact on productivity, fears that it may be difficult to dismiss disabled employees who do not perform and fears that disabled persons are not qualified to perform well. They also suggest strategies that vocational rehabilitation specialists may adopt to alleviate these fears.

on the enforcement of positive duties under the EEA, two studies in this regard were conducted and reported on in 2005 and 2008, respectively.⁶⁷³ A review of consultation with trade unions under the EEA, carried out by the Graduate School of Business at the University of Cape Town, showed that trade unions agreed on the following: (i) they are not properly consulted on employment equity; (ii) employers only provided them with information relating to, and consulted them on, basic matters; (iii) they [trade unions] did not place employment equity high on the agenda, partly because shop stewards were not well equipped to monitor employment equity measures and their implementation; and (iv) they relied on government to enforce affirmative action.⁶⁷⁴

A 2008 study commissioned by the Department of Labour showed that in Gauteng province, labour inspectors were of the view that the most serious problems were that employment equity plans were not central to workplaces and that employment equity forums were not representative.⁶⁷⁵ This limited representation is likely to be exacerbated for disabled people, who are under-represented in workplaces in general.⁶⁷⁶ An official at the Department of Labour also admitted that the Department had not enforced the EEA optimally since 2001 and that the emphasis was on measuring procedural compliance.⁶⁷⁷

These consultation processes are not directly relevant to job applicants, but may affect them indirectly. Workplaces that have a culture of consultation and are used to engaging with employees may be more likely to be receptive to requests for reasonable accommodation at all stages of the employment process. The transaction costs of assessing job applicants' reasonable accommodation needs and

⁶⁷³ Hepple 'Transformative Equality' 21-22.

⁶⁷⁴ Cited in Hepple 'Transformative Equality' 21.

⁶⁷⁵ Cited in Hepple 'Transformative Equality' 22.

⁶⁷⁶ See 1.1.

⁶⁷⁷ Hepple 'Transformative Equality' 22.

taking decisions on whether accommodation can be provided are also likely to be lower for employers who are already engaging in such processes.⁶⁷⁸

5.5.4 Need for more guidance

The EEA does not offer much ongoing advice and support to employers regarding compliance with the latter's positive duties. The CEE is established by the EEA.⁶⁷⁹ It consists of a chairperson and eight other part-time members.⁶⁸⁰ Its principal functions relate to advice to the Minister of Labour and issuing reports to the Minister regarding compliance with the Act.⁶⁸¹ These functions are limited if one considers the inadequate awareness of disability issues and the fact that exclusion of disabled people often inheres in standard work processes and environments, the relative novelty to employers of having to provide reasonable accommodation and the fact that many impairments raise medical issues about which many employers may be unable to consult technical experts.

⁶⁷⁸ RH Coase. "The Problem of Social Cost." (1960) 3 *Journal of Law and Economics* 1 at 15 set out some of the costs associated with transactions:

"In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on."

Harris 'Disabilities Accommodations' 6 notes that commentators have also added other costs of market transactions, including those relating to search and information gathering, bargaining and decision-making. He argues (at 607) that because the scope and content of reasonable accommodations are deliberately left open-ended, the transaction costs of negotiating these accommodations are generally higher than for other discrimination-related matters.

⁶⁷⁹ Section 28.

⁶⁸⁰ Section 29(1) of the EEA.

⁶⁸¹ These functions are set out in s 30 of the EEA:

"(1) The Commission advises the Minister on—

- (a) codes of good practice issued by the Minister in terms of section 54;
- (b) regulations made by the Minister in terms of section 55; and
- (c) policy and any other matter concerning this Act.

(2) In addition to the functions in subsection (1) the Commission may—

- (a) make awards recognising achievements of employers in furthering the purpose of this Act;
- (b) research and report to the Minister on any matter relating to the application of this Act, including appropriate and well researched norms and benchmarks for the setting of numerical goals in various sectors; and
- (c) perform any other prescribed function."

More can be done to offer support to employers. The US Equal Employment Opportunities Commission, for example, offers extensive enforcement guidelines on reasonable accommodation for specific kinds of disabilities, for specific classes of employers such as small businesses, and the establishment of procedures to facilitate reasonable accommodation.⁶⁸² If resources are limited, it may be possible to channel support to employers through, for example, DPOs, organisations such as the Human Rights Commission and tertiary institutions.

5.5.5 Attitudinal barriers to effective enforcement

A disturbing trend in many of the admittedly small sample of reported cases is that employers often failed to make any attempt to accommodate and, if they did, they failed to communicate effectively with the disabled employee or, where applicable, relevant technical advisers. In *Lucas*, for example, the arbitrator noted that it was not clear from the employer's evidence what steps it had taken to accommodate an employee with back problems.⁶⁸³ Any attempts made seemed to have been initiated by her trade union representative.⁶⁸⁴

Some cases also illustrate the limited awareness of disability as social oppression, how employers are implicated in the problem and their responsibilities in ensuring substantive equality. In both *Singh*⁶⁸⁵ and *Gebhardt*,⁶⁸⁶ the relevant employers were aware that the relevant job applicants were disabled. Both these employers were organs of state and showed scant regard for the disability rights of the two applicants. In *Singh*, the response was that disability is not one of the factors to be taken into account in appointing magistrates – the emphasis falls on race and

⁶⁸² See US Equal Employment Opportunity Commission. "Selected Enforcement Guidances and Other Policy Documents on the ADA." (1993-2007) http://www.eeoc.gov/laws/types/disability_guidance.cfm (Accessed: 6 February 2015).

⁶⁸³ *National Education Health and Allied Workers' Union (NEHAWU) obo Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA) para 31.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ 2013 (3) SA 66 (EqC).

⁶⁸⁶ *Gebhardt v Education Labour Relations Council and Others* (2013) 34 ILJ 1183 (LC).

gender.⁶⁸⁷ In *Gebhardt*, the employer justified its decision on the basis that the human resource management system did not reflect that the applicant had a disability.⁶⁸⁸

Robert Masambo, the chairperson of DPSA, in a parliamentary meeting in March 2013 suggested some reasons why not all state departments have met the target of having 2% of their staff complement being disabled people:

“Firstly, more work had to be done to change attitudes about disability, especially amongst senior public representatives and public servants, as they still saw disability from a welfare and medical perspective. DPSA lamented the fact that certain departments were chasing targets, but were not really adding value to employment of disabled persons, in that they were employing disabled people at entry level positions only, and employing them ‘categorically’. [...] There was one disabled senior state official who had been employed, but had not been provided with a personal assistant, and his spouse had been required to help with overall administration of their office. DPSA emphasised that whenever someone was employed, reasonable accommodation must be provided to cater for needs, as virtually nothing had been done in this direction to date.”⁶⁸⁹

Another potential attitudinal barrier lies in the tension that may develop between various designated groups. The potential for this tension is illustrated by the facts in *Gebhardt v Education Labour Relations Council and Others*.⁶⁹⁰ Ms Gebhardt, a White woman, had been employed by the Western Cape Education Department since 1992. In 2003, she suffered severe bouts of vertigo related to a middle-ear disease that affected her hearing to the point that she was deaf by 2006. In April of that year she applied for a promotional post. Even though she scored the highest in

⁶⁸⁷ At paras 20-22.

⁶⁸⁸ At para 9.

⁶⁸⁹ Parliamentary Monitoring Group ‘DPSA Briefing on Education’ 2.

⁶⁹⁰ (2013) 34 ILJ 1183 (LC).

respect of selection criteria and was the preferred candidate, she was not appointed. Instead, Ms Van Voore, a Coloured woman, was appointed because in terms of the employer's employment equity targets Coloured women were under-represented in the further education and training sector.

As it transpired, the respondent employer had simply not taken Ms Gebhardt's disability into account. However, an underlying concern is how to create buy-in for restitutionary measures for disabled people when these measures seem to clash with providing restitution to Black people and women. Given the history of racial oppression in South Africa, White disabled people are more likely to have had access to educational and other opportunities that will allow them a competitive advantage relative to their Black counterparts. That is an issue that relates to the targeting of affirmative action measures and falls beyond the scope of the discussion here. However, what is clear is that difficult issues regarding the intersection of race, gender and disability may affect implementers' receptiveness to work towards improving access to employment for disabled people.

5.5.6 Constraints facing job applicants

The reported cases on reasonable accommodation of disability have mostly arisen in the context of dismissals for incapacity or misconduct.⁶⁹¹ In light of this fact, as well as the fact that reported cases do not provide a holistic picture of what happens in organisations, it is difficult to assess how reasonable accommodation has impacted access to work for disabled job applicants. There are ways, however, in which job applicants are likely to face different challenges than those disabled people who are already in employment.

⁶⁹¹ See *McLean v Sasol Mine (Pty) Ltd Secunda Collieries; McLean v Sasol Pension Fund* 2003 (6) SA 254 (W); *National Education Health and Allied Workers' Union (NEHAWU) obo Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA); *Ferreira and Standard Bank of SA* (2006) 27 ILJ 1547 (CCMA); *Wylie and Standard Executors and Trustees* (2006) 27 ILJ 2210 (CCMA); *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1239 (LC); *Abels and Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA); *Independent Municipal and Allied Trade Union obo Strydom v Witzenberg Municipality and Others* (2012) 33 ILJ 1081 (LAC); *Granchelli and SA Revenue Service* (2012) 33 ILJ 2481 (CCMA); and *L S v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 2205 (LC).

Employers' attitudes in general may be less receptive to providing reasonable accommodation to job applicants than to existing employees. This may flow from employers' belief that they owe a greater duty to current employees than to job applicants. In contrast, they may hold the view that they should be unencumbered in their hiring decisions, a belief that flows from the sanctity of private property and the 'free market' as the neutral, objective arbiter of relationships between all economic actors, as discussed in Chapter 3.⁶⁹² Furthermore, faced with other appointable applicants, employers may simply justify the non-appointment of a disabled applicant on the basis that a more suitable person was appointed.

Structural features of the South African labour market militate against the provision of reasonable accommodation. There is a significant labour surplus in South Africa, especially at lower levels where most disabled people are likely to apply for posts. Triangular employment relationships in which labour brokers act as go-betweens between their clients and employees also create challenges. While the law regards the labour broker as the employer, the client is the one that has to agree to reasonable accommodation measures. Given the power dynamics between clients and labour brokers, disabled employees may be sacrificed to keep clients happy. This was prevented from occurring in *Abels*,⁶⁹³ and in *Hoffmann* the Constitutional Court emphasised that client preferences that are discriminatory do not justify employers' discrimination.⁶⁹⁴ Despite these principles, a disabled applicant has to challenge the decision, which may be difficult.

Attitudinal barriers may persist in the face of legal duties, especially if those duties are enforced in a manner that emphasises disability targets at the expense of the work experiences of disabled persons. Seirlis emphasises the importance of attitudinal factors:

"[I]n many cases, the reasonable accommodation issue does not lie with satisfying a physical requirement that the person with a disability needs. Accommodation lies rather with sensitising existing employees to honour and

⁶⁹² See 3.2.2.

⁶⁹³ *Abels and Dialogue Group (Pty) Ltd* (2009) 30 ILJ 2167 (CCMA).

⁶⁹⁴ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 34.

respect the skills of the person with a disability and to understand the nature of the disability in order to develop a team spirit that is conducive to the deployment of those very skills that were employed. It is this attitude in the workplace that commands the success or failure of introducing a person with a disability to the workplace – and these attitudinal factors, I boldly state, are far more important than obeying the letter of any law. Persons with disabilities (along with many black people and women) have had far too many experiences of being tolerated as a ‘requirement’ or of being cynically used as ‘window dressing’, for us to underestimate the importance of attitudes.”⁶⁹⁵

Another structural barrier faced by disabled job applicants is that recruitment is often not inclusive, a situation that may be exacerbated by the fact that many disabled people do not have access to networks that would allow them to participate. The Public Service Commission, for example, has commented that current recruitment strategies in the public service were ineffective in reaching disabled people and that a combination of recruitment techniques should be used.⁶⁹⁶ One of these strategies is to work with DPOs. Another is to work with, for example, tertiary institutions, schools and other organisations that may link prospective employers with prospective disabled employees. Government’s role in facilitating access to employment by disabled people will be discussed in the next chapter.

5.6 Positive duties and structural change

Ngwenya argues that reasonable accommodation offers much in the way of transformative equality, but that there are significant constraints to its utility, foremost of which is the fact that employers are expected to bear the cost of accommodation.⁶⁹⁷ This ‘privatisation’ of redistribution means that accommodation

⁶⁹⁵ A Seirlis and L Swartz. Entrepreneurship, Employment and Skills Development: Ari Seirlis in Conversation. In: B Watermeyer, L Swartz, T Lorenzo, M Schneider and M Priestley (eds). *Disability and Social Change: A South African Agenda*. (2006) 361 at 364. For a recent study on attitudes to disabled persons in the employment context, see C Wiggett-Barnard. *Disability Employment Attitudes and Practices in South African Companies: A Survey and Case Studies*. (2013).

⁶⁹⁶ Parliamentary Monitoring Group ‘DPSA Briefing on Education’ 3.

⁶⁹⁷ Ngwenya ‘Search for Equality’ 500.

will be heavily dependent on the resources the employer has at its disposal relative to the expense required by a particular adjustment.⁶⁹⁸ There may be ways to subsidise accommodation costs and to create public-private partnerships to share the financial burden of accommodation, but such schemes do not yet exist in South Africa. Possibilities created by the legislative and policy framework relating to employment services will be discussed in the next chapter.

Another reason why reasonable accommodation is less transformative than it may initially appear is that it may create the possibility that some disabled people can participate without addressing the norms and practices that constitute the bulk of the structural oppression disabled people experience. Seirlis has pointed out, for example, that reasonable accommodation, when used to refer to major structural changes to buildings to improve accessibility, shifts the focus from the fact that building regulations regarding accessibility should be complied with.⁶⁹⁹ It is the anticipatory duty to remove structural barriers that will be more effective, not reasonable accommodation and its focus on specific, situation-sensitive and cost-effective solutions borne by individual employers. The difficulty is that courts are likely to find that employers are not the ones who have to bear anticipatory duties. These duties therefore have to be performed by other role players, one of which is the state. The issue of state obligations and their role in facilitating access to employment for disabled people will be addressed in the next chapter.

5.7 Concluding remarks

This chapter has engaged with the positive duties on employers to facilitate access to employment for disabled people. While there is a combination of positive non-discrimination duties and affirmative action duties, it was found that the positive discrimination duties were more powerful in securing immediate remedies for aggrieved persons. However, these remedies do not necessarily lead to the establishment of structures that are receptive to and that can facilitate the inclusion

⁶⁹⁸ Ibid.

⁶⁹⁹ Seirlis and Swartz 363-364.

of disabled persons. The affirmative action structures established by the EEA may therefore be of some assistance in this regard. However, the command-and-control regulatory approach to the enforcement of the EEA inhibits its potential to enrich consultation processes and to lead to change that is deeper than a mere focus on demographic representation.

The reasonable accommodation duty, which is central to the legislative mechanism for advancing disabled people's access to employment, has various advantages. However, costs to the employer are a significant limitation to its potential, as is the reactive, adversarial enforcement mechanism that, for various reasons, may be difficult for disabled job applicants to assert. Furthermore, reasonable accommodation may include individual disabled people within employment without addressing the structural features of disabled people's exclusion. Courts are unlikely to hold employers liable for such exclusion, which means that at a macro level, the state's duties to facilitate access to employment for disabled people have to be explored. It is to this issue that we proceed in the next chapter.

CHAPTER 6: POSITIVE STATE DUTIES IN RESPECT OF ACCESS TO EMPLOYMENT: THE PROVISION OF EMPLOYMENT SERVICES

6.1 Introduction

In the previous chapter, one of the main themes was the fact that the employer's positive duties, including the duty to reasonably accommodate disabled employees, are applicable at the level of individual firms. As a result, their scope is limited to the micro sphere and to disabled persons who are already in a position to take advantage of whatever employment opportunities exist – people who are suitably qualified. In order to advance change that is more structural in nature, we will have to look to the state's role in promoting redistribution and providing the support and assistance that disabled people may need in various socio-economic spheres.⁷⁰⁰

In light of the weakening power of the nation state in a globalised world, the state fulfilling duties may not be the powerful mechanism it once was.⁷⁰¹ However, in a labour surplus economy in which job creation is not occurring at satisfactory rates⁷⁰² and in a context of gaping inequalities,⁷⁰³ active labour market interventions to

⁷⁰⁰ See E McLaughlin. "From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK." (2007) 6(1) *Social Policy and Society* 111, who argues that a country's 'equality regime' consists of its "equality law together with the total redistributive or equalizing impact of its social welfare system." See, also, Bhabha 'Disability Equality' at 219, who writes:

"As one of society's most disadvantaged groups, often living precariously near or in poverty, protection of the interests of the disabled almost always requires positive measures. The interrelation of equality and other rights, especially socio-economic rights, is therefore indispensable."

⁷⁰¹ Hepple 'Transformative Equality' 5 asserts:

"In the present period of almost unrestrained financial capitalism in which large sums of capital can be moved around the globe at the touch of a computer, the weakness of nation states in protecting the poor and vulnerable against the growing power of corporate private property is self-evident."

⁷⁰² See 6.2.3.1.

⁷⁰³ M Leibbrandt, A Finn and I Woolard. "Describing and Decomposing Post-Apartheid Income Inequality in South Africa." (2012) 29(1) *Development Southern Africa* 19 at 26 conclude that money-metric inequality in South Africa, on aggregate and intra-racially, has increased between 1993 and 2008. One of the striking findings (at 22) relates to the concentration of income across the distribution:

"The results indicate that income has become increasingly concentrated in the top decile. In fact, in 2008 the wealthiest 10% accounted for 58% of total income. This trend is evident even within the top decile itself, as the richest 5% maintain a 43% share of total income, up from

support groups that are disproportionately disadvantaged, such as the youth, Black people, women, people in rural areas and disabled people, become imperative.⁷⁰⁴

In addition to demand-side interventions, supply-side interventions are necessary to ensure that disabled people are able to make use of the opportunities with which they are presented. Any job creation initiatives are bound to prove ineffective if we are unable to address the causes of disadvantage that may be present all along the private-public continuum of disabled people's lives. This is a central premise of the capability approach, as discussed in Chapter 3.⁷⁰⁵ It is also consistent with social-model analyses of work that "reject the notion that unemployment and underemployment among disabled workers can be understood in isolation from other factors such as education, transport, the built environment, access, ideology and culture."⁷⁰⁶

6.1.1 Broad objectives

It is not possible to address all those state duties that will contribute towards access to work for disabled people. Instead, I will discuss the relevance of the content and implementation of one constitutional right, namely the right of access to social security, to this project. I focus on this right because it is not clear whether the scope of the right encompasses access to work. I will argue here that a combination of this right, together with an emphasis on substantive equality, can inform an approach that allows disabled people who are willing and able to work to gain access to such work. The approach will also allow those who are not able to work to have their citizenship affirmed.

about 38% in 1993. Furthermore, the cumulative share of income accruing to the poorest 50% dropped from 8.32% in 1993 to 7.79% in 2008."

⁷⁰⁴ J Seekings. "Taking Disadvantage Seriously: The 'Underclass' in Post-Apartheid South Africa." (2014) 84(1) *Africa* 135 at 136 writes:

"South Africa's poor comprise both working poor and unemployed, and many poor households include both working poor and unemployed people. The poor thus stand to benefit from both job creation and higher wages (unless higher wages result in job destruction). Many unemployed people live in households with working people, and would benefit indirectly if such working people received higher wages."

⁷⁰⁵ See 3.3.2.

⁷⁰⁶ Barnes 'Working Social Model?' 444. See, also Seirlis and Swartz 363.

Furthermore, our understanding of the right may be enriched by considering the implications of the debates on social understandings of disability and substantive equality for the state's duty to provide access to social security. At the same time, the examination of how the right is to be realised may provide insights into the practical import of the theoretical perspectives discussed in Chapters 2 and 3.

6.1.2 Chapter structure

The chapter proceeds as follows: Part 2 contains a summary of the salient features of the right to access to social security, as contained in jurisprudence and academic commentary. In Part 3, I consider how access to work may be implicated in the right, if at all. The focus in Part 4 is on some legislative measures for the provision of employment services and analysing these measures in light of disabled people's rights to access to social security and to equality.

6.2 The rights dimension of access to social security

6.2.1 Duties imposed by the Bill of Rights in respect of all rights

The right to access to social security is enforceable, because s 2 of the Constitution states that all the obligations imposed by it must be fulfilled, while s 7(2) requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". These duties are imposed in respect of all the rights in the Bill of Rights, regardless of whether they are civil and political rights or socio-economic rights.⁷⁰⁷

⁷⁰⁷ In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 77-78, the Constitutional Court rejected arguments that socio-economic rights should not be justiciable because these rights infringe on the separation of powers and because they invariably have implications for the way public money is spent. The Court held that the enforcement of civil and political rights may also have budgetary implications. It does not follow that, because socio-economic rights are more likely to have budgetary implications, such rights require courts to encroach impermissibly on the powers of the legislature and the executive. At the very least, so the Court reasoned, such rights can be "negatively protected from improper invasion."

The primary duty to respect implies a duty to refrain from impairing or otherwise interfering with the enjoyment of a right holder's rights.⁷⁰⁸ The secondary duty to protect does not require the transfer of money or resources directly to people, but rather that the state must establish and sustain legislative and other frameworks within which rights are protected without interference from others.⁷⁰⁹ The tertiary duty to promote and fulfil rights is less precise in scope and will largely depend on how the rights in question are formulated.⁷¹⁰ Sometimes the state will have to facilitate rights holders' realisation of their rights and, at other times, the state will have to provide food, healthcare or water when people cannot provide for themselves.⁷¹¹ All these duties are relevant to the scope of the right to access to social security.

6.2.2 General interpretive principles

A few general interpretive principles apply when decisions are made on the content and scope of rights. Firstly, the right has to be interpreted in its textual, as well as its social and historical context.⁷¹² With regard to its text, an all-important principle is that all the rights in the Bill of Rights are interrelated and mutually supporting.⁷¹³ We cannot, therefore, interpret the right in isolation from the other rights in the Bill of Rights. For present purposes, our emphasis will be on the interrelationship of the right to access to social security and the right to equality.

⁷⁰⁸ UN Committee on Economic Social and Cultural Rights. "General Comment No. 19, The Right to Social Security." (2008) <http://www.refworld.org/docid/47b17b5b39c.html> (Accessed: 17 May 2015) (hereinafter referred to as "UN 'General Comment 19'") para 44. See, also, *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) paras 31-34 for a discussion of the negative state duty in respect of the right to access to adequate housing.

⁷⁰⁹ UN 'General Comment 19' paras 45-46. See, also, P De Vos. "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution." (1997) 13(1) *South African Journal on Human Rights* 67 (hereinafter referred to as "De Vos 'Pious Wishes'") at 83.

⁷¹⁰ De Vos 'Pious Wishes' 86.

⁷¹¹ UN 'General Comment 19' refers to only three levels of duties, but states that the duty to "fulfil" can be subdivided into a duty to facilitate, promote and provide (at paras 47-51).

⁷¹² *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) para 22.

⁷¹³ *Grootboom* para 23.

A consideration of the social and historical context of the right has to take into account the vast inequalities within South African society. In *Soobramoney*, Chaskalson P (as he then was) reminded us of this reality:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”⁷¹⁴

The sheer magnitude of existing inequalities means that there is intense competition for resources and difficult allocative decisions have to be made.⁷¹⁵ The Constitutional Court has recognised these difficulties, but has emphasised that socio-economic rights create obligations that courts “can, and in appropriate circumstances must, enforce.”⁷¹⁶ Before enforcement becomes relevant, though, two aspects warrant attention, namely the scope of the right and the nature and extent of the obligations it imposes.

6.2.3 The right to access to social security

Section 27 of the Constitution provides the following in respect of access to social security:

“(1) Everyone has the right to have access to—

(a) [...]

(b) [...]

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁷¹⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para 8.

⁷¹⁵ *Soobramoney* para 11.

⁷¹⁶ *Grootboom* para 94.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

With regard to the structure of the section, the Constitutional Court has made it clear that the content of the right enshrined in s 27(1) is limited by a lack of resources and therefore has to be read conjunctively with s 27(2). As Mokgoro J stated in *Khosa*,

“[S]ection 27(1) and section 27(2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) right can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1).”⁷¹⁷

When interpreting the right to access to social security, it is therefore important not to divorce the ambit of the right from the state’s positive obligations in respect thereof.

6.2.3.1 The ambit of the right

The scope of the right to access to social security rests upon two pillars. The first is the determination of who is protected in specific instances. The second relates to what is meant by “access to social security”.

In *Khosa*, Mokgoro J emphasised that the rights in ss 26(1) and 27(1) are conferred on “everyone,” unlike s 25(5), for example, which requires the state to promote South African citizens’ access to land.⁷¹⁸ She also referred to s 7(1) of the Constitution, which states that the Bill of Rights “enshrines the rights of all people in our country”. She therefore held that, in the absence of any contrary intention, “everyone” must be interpreted to include permanent residents.

⁷¹⁷ *Khosa* para 43.

⁷¹⁸ At para 46. Section 25(5) of the Constitution reads: “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable *citizens* to gain access to land on an equitable basis [emphasis added].”

The decision on whether permanent residents are intended beneficiaries of the right in s 27 is not the end of the matter, because the right itself has an internal limitation. An assessment therefore has to be made on whether it was reasonable to exclude permanent residents from the scheme, bearing in mind the purpose of providing social access to social security; the effect exclusion would have on the excluded group, particularly how it would impact on other rights; as well as any resource constraints the state may face.⁷¹⁹ The “reasonableness” standard is discussed below.⁷²⁰

The second pillar of the ambit of the right is that it grants protected persons “access to social security”, not “social security”. Yacoob J in *Grootboom* explained the import of the difference in the context of the right to “access to housing”.⁷²¹ First, it means people are not only entitled to a house, but to all that is necessary for them to access housing, for example, land, water and sewerage services. Second, it implies that it is not only government that must provide housing, but that other societal actors, including individual beneficiaries of the right, must be enabled to provide housing. A distinction must be made between those who can afford to provide for their own housing and those who cannot. In respect of the former, the state’s principal obligation is to unlock the system through regulatory measures such as planning laws and regulating access to finance. In respect of those who cannot afford to build their own houses, government has a duty to provide.

What, then, is the meaning of “social security”? Cheadle, Davis and Haysom suggest the following:

“The term “social security” is a broad term which may be used to include both social insurance, directly contributed benefits of workers and their families, and social assistance, which includes needs-based assistance from public funds for the most vulnerable who have indirectly contributed as members of society.”⁷²²

⁷¹⁹ *Khosa* para 49.

⁷²⁰ See 6.2.4.1.

⁷²¹ At paras 35-36.

⁷²² MH Cheadle, DM Davis and NRL Haysom (eds). *South African Constitutional Law: The Bill of Rights*. (2000) 501.

Similarly, the 2002 Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa Report No 3: Constitutional Framework of Social Security in South Africa: Regulation, Protection, Enforcement and Adjudication (hereinafter referred to as “Taylor Committee Report No 3”) stated the following:

“Clearly evident from the wording of section 27(1)(c), is that the intention [is] access to social security in the comprehensive sense, and the specific issue of social assistance. The former would also incorporate the social insurance system (e.g. contribution-based systems such as Compensation for Occupational Injuries and Diseases Act (COIDA), the Road Accident Fund (RAF) and Unemployment Insurance Fund (UIF), as well as, occupational retirement schemes). [...] Adopting a purposive approach towards the interpretation of fundamental rights, the underlying rationale and purpose of the right to access to social security and to social assistance is to provide to everyone an adequate standard of living.”⁷²³

In both these extracts, the only additional measures included within the broader concept of social security are social insurance measures. Both articulations, I argue, recognise that the scope of the right may be wider than just a combination of social assistance and social insurance. The Taylor Committee Report No 3 further recognises that our interpretation of the ambit of the right has to be animated by the overall purpose of providing social security.

The Constitutional Court has endorsed this purposive approach to the interpretation of the rights on numerous occasions.⁷²⁴ In addition, it has emphasised that the rights in the Bill of Rights must, as far as language permits, be accorded a generous interpretation so that individuals are extended the full benefit of constitutional protection.⁷²⁵ The nature and extent of this protection must also be offered in ways

⁷²³ Taylor Committee Report No 3.

<http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/report3.pdf> (Accessed: 6 February 2015) 43.

⁷²⁴ See, for example, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 9 and *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 8;

⁷²⁵ The general approach is encapsulated by this dictum from the Canadian case of *R v Big M Drug Mart Ltd* [1985] 18 DLR (4th) 321 at 395-396 and which was endorsed by Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC) para 15 and by Chaskalson P (as he then was) in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 9:

that advance the founding values and objectives of the Constitution as a whole.⁷²⁶ It is in this spirit that we have to fashion the content of the term “social security”, as used in s 27.

The connotations of the phrase ‘social security’ are contested and its meaning may differ from country to country and develop over time.⁷²⁷ Traditionally, social security is said to comprise social assistance and social insurance. Social assistance has been defined in the South African context as “state provided basic minimum protection to relieve poverty, essentially subject to qualifying criteria on a non-contributory basis.”⁷²⁸ Social insurance, on the other hand, is defined as a “mandatory contributory system of one kind or another, or regulated private sector provision, concerned with the spreading of income over the life cycle or the pooling of risks.”⁷²⁹

Kaseke argues that the traditional view of social security emanated from Europe and North America at a time when the focus was on the protection of workers in the formal labour market.⁷³⁰ The assumption was that everyone who was willing and

"The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be [...] a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."

⁷²⁶ In *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 8, Mahomed J reiterated his own statements on this aspect in *Government of the Republic of Namibia and Another v Cultura* 2000 and *Another* 1994 (1) SA 407 (NmS) 418F-G:

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

⁷²⁷ ILO. *Social Security: A New Consensus*. (2001) http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_209311.pdf (Accessed: 6 February 2015) 2. See, also, MP Olivier. Social Security: Framework. 13(2) *The Law of South Africa*. para 17; A Dekker, L Jansen Van Rensburg, R Liffman, M Thompson and A Van der Walt. "Social Security: A Conceptual View." (2000) 4(1) *Law, Democracy and Development* 1 at 3.

⁷²⁸ Taylor Committee Report No 3 at 36.

⁷²⁹ Ibid.

⁷³⁰ E Kaseke. Social Protection in SADC: Developing an Integrated and Inclusive Framework – A Social Policy Perspective. In: MP Olivier and ER Kalula. *Social Protection in SADC: Developing an Integrated and Inclusive Framework*. (2004) 1.

able to work would find work.⁷³¹ This assumption is not valid in a country that has a high unemployment rate.⁷³² The nature of unemployment in South Africa also has to be borne in mind. Unemployment is systemic and concentrated amongst the youth (people aged between 18 and 35 years).⁷³³ The majority of unemployed people are semi-skilled or unskilled and there is a mismatch between the demand for labour and the skills profile of most work seekers.⁷³⁴ South Africa's social security system, in

⁷³¹ Kaseke 2.

⁷³² StatsSA, in its Quarterly Labour Force Survey (Quarter 4, 2014) <http://www.statssa.gov.za/publications/P0211/P02114thQuarter2014.pdf> (Accessed: 17 May 2015), reported (at v) that the unemployment rate in South Africa from October to December 2014 was 24.3%. The survey used a narrow definition of 'unemployed persons', namely "those (aged 15–64 years) who:

- a) Were not employed in the reference week and;
- b) Actively looked for work or tried to start a business in the four weeks preceding the survey interview and;
- c) Were available for work, i.e. would have been able to start work or a business in the reference week

or;

- d) Had not actively looked for work in the past four weeks but had a job or business to start at a definite date in the future and were available." (at xxiv)

A broader definition of unemployed persons to include those who had not sought work in the preceding four weeks would see the figure of 24.3% rise appreciably.

⁷³³ C Ardington, A Case, A Menendez, T Bärnighausen, D Lam and M Leibbrandt. "Youth Unemployment and Social Protection." (2014)

<http://opensaldru.uct.ac.za/bitstream/handle/11090/723/SALDRU%20Research%20Brief%20-%20Dec%202013%20-%20Youth%20unemployment%20and%20social%20protection.pdf?sequence=3> (Accessed: 6

February 2015) write that youth unemployment in South Africa is severe and explain some of its main characteristics:

"In 2012, the strict unemployment rate for youth aged 15-24 years was 40%, a measure requiring that individuals are actively looking for work. On a broader definition that includes the country's large numbers of 'discouraged' workers – those who are not actively seeking work but say they are willing to take a job – the rate was 66%. Strong racial disparities are evident: unemployment amongst white youth is 18% compared to 41% among African youth. Youth unemployment also reflects the spatial inequalities that stem from apartheid-era policies of 'separate development'. Using the broad definition, youth unemployment in rural areas is 82% compared to 58% in urban formal areas. The difference when using the strict definition is less pronounced (33% versus 44%), suggesting that rural youth are more likely to become discouraged in their search for employment."

Youth unemployment is a global crisis. See ILO. "The Youth Unemployment Crisis: A Call for Action." (2012)

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_185950.pdf (Accessed: 6 February 2015), in which the ILO (at 3) stated:

"In 2012, close to 75 million young people worldwide are out of work, 4 million more are unemployed today than in 2007, and more than 6 million have given up looking for a job. More than 200 million young people are working but earning under US\$2 a day. Informal employment amongst young people remains pervasive."

The organisation urged governments, employers and workers to work even harder to "promote, create and maintain decent and productive jobs." It also called on all relevant national, regional and international organisations to "take urgent and renewed action to address the crisis."

⁷³⁴ J Streak and C Van der Westhuizen. "Fitting the Pieces Together: A Composite View of Government's Strategy to Assist the Unemployed in South Africa 1994-2004" (2004) <http://www.sarpn.org/documents/d0000962/> (Accessed: 6 February 2015) 1 at 1 and 23.

which social insurance is mostly based on formal employment and in which social assistance is targeted to specific groups, therefore reaches only a very small percentage of the population.⁷³⁵

The ILO's Convention 102 on Social Security (Minimum Standards) identifies nine social risks, namely "sickness, maternity, employment injury, unemployment, invalidity, old age, death, provision of medical care and provision of subsidies for families with children."⁷³⁶ It then defines social security as a set of measures that mediate the financial consequences when these risks eventuate.⁷³⁷ The measures either seek to replace income or to adjust income when exceptional expenditures are necessary.⁷³⁸

Commentators have argued that the ILO definition has various shortcomings, particularly in the context of developing countries.⁷³⁹ It focuses on formal employment despite the high proportion of workers outside this system, as discussed above.⁷⁴⁰ The risk-based approach excludes provision for basic needs.⁷⁴¹ The risks included are individual in nature and exclude contingencies that are highly prevalent

⁷³⁵ See M Olivier, J Masabo and E Kalula. "Informality, Employment and Social Protection: Some Critical Perspectives for/ from Developing Countries." (2012) <http://ilera2012.wharton.upenn.edu/RefereedPapers/OlivierMarius%20JulianaMasabo%20EvanckalulaUPDATED.pdf> (Accessed: 6 February 2015) 5 and W Van Ginneken. "Extending Social Security: Policies for Developing Countries." (2003) http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_207684.pdf 7 (Accessed: 6 February 2015). Van Ginneken points out that (as at 2003) in low-income countries more than 90% of people were not covered by social security, while the corresponding figures for middle-income countries range from 20% to 60%. It was estimated that worldwide only 20% of populations were covered.

⁷³⁶ ILO Convention 102. "Social Security (Minimum Standards)." (1952) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312247 (hereinafter referred to as "ILO 'Convention 102'") (Accessed: 6 February 2015).

⁷³⁷ J Berghman. "The Resurgence of Poverty and the Struggle against Exclusion: A New Challenge for Social Security in Europe?" (1997) 50(1) *International Social Security Review* 3.

⁷³⁸ Ibid.

⁷³⁹ See S Guhan. "Social Security Options for Developing Countries." (1994) 133(1) *International Labour Review* 35 at 37 for an overview of the limitations of what the author terms "the formal model" of social security.

⁷⁴⁰ LG Mpedi. "Pertinent Social Security Issues in South Africa." (2008) <http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/Research%20Series/Pertinent%20social%20security%20issues%20in%20South%20Africa.pdf> 6 (Accessed: 6 February 2015).

⁷⁴¹ Berghman 3; Mpedi 6.

in developing countries.⁷⁴² The definition also does not include measures to prevent and remedy social insecurity.⁷⁴³

Berghman also notes that in Europe in the late 1980s, social security policy discussions seemed to shift from a sole focus on income deprivation to a broader notion of “social exclusion”.⁷⁴⁴ The roots of social exclusion as a concept are related to the centuries-old notion that deprivation is both a cause and effect of people’s inability to participate in their communities.⁷⁴⁵ It has been defined as a failure in one or more of the following systems: “the democratic and legal system, which promotes civic integration; the labour market, which promotes economic integration; the Welfare State system, promoting what may be called social integration; the family and community system, which promotes interpersonal integration.”⁷⁴⁶

Sen argues that the value of social exclusion lies in its emphasis on relational features of deprivation.⁷⁴⁷ The implication is that one group has the power to deny another group access to social goods and opportunities on the basis of criteria that the former has the power to set and seeks to justify.⁷⁴⁸ Consequently, the concept of social exclusion requires us to examine the causal processes that lead to exclusion, whether this is deliberate or incidental.

Sen warns that not all deprivation can usefully be attributed to exclusion. He cites the example of food shortages caused by a wide variety of factors, which may all linguistically be described as being the result of social exclusion, but all of which do not have relational causes. Food shortages for a peasant family as a result of crop failure may not have a relational component that can usefully be described as

⁷⁴² Olivier, Masabo and Kalula 5.

⁷⁴³ Mpedi 6.

⁷⁴⁴ Berghman 4.

⁷⁴⁵ A Sen. “Social Exclusion: Concept, Application, and Scrutiny.” (2000) http://housingforall.org/Social_exclusion.pdf (Accessed: 6 February 2015) 5.

⁷⁴⁶ Berghman 6.

⁷⁴⁷ Sen 6.

⁷⁴⁸ South Africa. *Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa (2002): Report No 2: The Socio-Economic Context: An Imperative for Social Protection.* <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/report2.pdf> (Accessed: 6 February 2015) (hereinafter referred to as “Taylor Committee Report No 2”) at 17.

exclusion. However, food shortage caused by the cancellation of food subsidies to certain groups may be the direct result of exclusionary processes. Where food shortages occur due to unemployment eroding purchasing power, the causes of such unemployment may or may not be relational. Efforts at promoting social security therefore have to focus on more dynamic, multi-layered processes of exclusion rather than just a static outcome of a shortage of money.⁷⁴⁹

Berghman asserts that the goals of social security are best described by considering the basic policy chain that underpins social policy:

“[W]e educate and train people to ensure that they may be adequately integrated into the (paid) labour market. Such integration would give them the opportunity to gain a primary income. And this income in turn enables them to have command over resources to guarantee their social participation.”⁷⁵⁰

It is when this chain is endangered or broken that social security measures are necessary to provide a minimum level of income or replace lost income in order to safeguard social participation.⁷⁵¹ The ultimate objective is to prevent deprivation, as well as vulnerability to deprivation,⁷⁵² in order to achieve “equality, security and a share of wealth to all.”⁷⁵³ It also implies that when risks eventuate, measures may be required to (re)integrate survivors into the labour market and their broader social environment.

The ILO, in its Recommendation 202 of 2012 on National Social Protection Floors, recognises the importance of prevention and (re)integration into the labour market. Article 10 reads:⁷⁵⁴

“In designing and implementing national social protection floors, Members should:

⁷⁴⁹ Berghman 7-8. See, also, Taylor Committee Report No 2 at 17-18.

⁷⁵⁰ Berghman 9.

⁷⁵¹ Berghman 10.

⁷⁵² Van Ginneken 10.

⁷⁵³ B Baron von Maydell. Fundamental Approaches and Concepts of Social Security. In: R Blanpain (ed). *Law in Motion – International Encyclopaedia of Laws*. (1997) 1029 at 1039.

⁷⁵⁴ ILO Recommendation 202. “National Social Protection Floors.” (2012) http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:3065524 (Accessed: 17 May 2015).

(a) combine preventive, promotional and active measures, benefits and social services;

(b) promote productive economic activity and formal employment through considering policies that include public procurement, government credit provisions, labour inspection, labour market policies and tax incentives, and that promote education, vocational training, productive skills and employability; and

(c) ensure coordination with other policies that enhance formal employment, income generation, education, literacy, vocational training, skills and employability, that reduce precariousness, and that promote secure work, entrepreneurship and sustainable enterprises within a decent work framework.”

The Recommendation also emphasises “effective social dialogue and social” participation when the formulation and implementation of social security extension strategies are at issue.⁷⁵⁵

The ILO Employment Promotion and Protection Against Unemployment Convention⁷⁵⁶ requires member states to “declare as a priority objective a policy designed to promote full, productive and freely chosen employment by all appropriate means, including social security. Such means should include, inter alia, employment services, vocational training and vocational guidance.”⁷⁵⁷ This clearly envisages that such measures could form part of social security.

At regional level, the African Union, in its Social Policy Framework for Africa, states:

“Social protection includes responses by the state and society to protect citizens from risks, vulnerabilities and deprivations. It also includes strategies and programmes aimed at ensuring a minimum standard of livelihood for all people in a given country. This entails measures to secure education and health care, social welfare, livelihood, access to stable income, as well as

⁷⁵⁵ Article 13(1). See also, ILO Convention 168 of 1988 (see below).

⁷⁵⁶ ILO Convention 168. “Employment Promotion and Protection against Unemployment.” (1988) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312313 (Accessed: 17 May 2015).

⁷⁵⁷ Article 7.

employment. In effect, social protection measures are comprehensive, and are not limited to traditional measures of social security.”⁷⁵⁸

From the above, it is clear that there have been consistent calls for a broader conception of social security that goes beyond social insurance linked to formal employment and cash transfers from government to vulnerable groups. It is in this context that the notion of ‘social protection’ was born. The Taylor Committee Report No 3 recommended an approach the Committee termed “comprehensive social protection”, which it defined as follows:

“Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.”⁷⁵⁹

It is evident that in the last two decades, at least, more comprehensive, proactive and forward-looking approaches to social security have been endorsed at international, regional and domestic levels. Whether these changes call for a broader constitutional conception of ‘social security’ that encompasses more than discrete social assistance and social insurance measures is debatable. I argue below that such a broader conception is more consistent with general principles of constitutional interpretation and notions of substantive, transformative equality and could prove strategically beneficial for disabled persons wishing to assert rights relating to access to work.

⁷⁵⁸ African Union. *Social Policy Framework for Africa*. (2008) <http://sa.au.int/en/content/social-policy-framework-africa> (Accessed: 17 May 2015) para 13.

⁷⁵⁹ Taylor Committee Report No 3 at 41.

6.2.3.2 Access to work for disabled persons

Labour law and social security law intersect in various ways. For most people who are socially secure, wage labour is the primary means through which to attain that security.⁷⁶⁰ Employment-based social insurance to cover risks such as unemployment and occupational injuries and diseases forms part of the social security system and is administered by the Department of Labour. In some instances, inability to work or a lack of available employment is an eligibility requirement to qualify for social assistance.

The interrelationship between labour and social security is clear. What is not clear is whether the right to access to social security can be interpreted to include employment creation and unemployment prevention measures. Govindjee and Dupper have argued that some form of constitutionalisation of, or the establishment of a legislative framework for, government's employment creation and unemployment prevention activities is necessary.⁷⁶¹ However, they dismiss the possibility that the right to access to social security, read with other rights, can be an appropriate vehicle through which to achieve this.⁷⁶² In their view, "social security" has traditionally been interpreted narrowly to refer to only social insurance and social assistance measures and must be distinguished from the more general notion of social protection.⁷⁶³ Neither social assistance nor social insurance can, on their argument, be interpreted to impose obligations on government in relation to a right to work.⁷⁶⁴

⁷⁶⁰ A distinction must be drawn between those who are in formal employment and those in precarious, marginal jobs. As Seekings points out (at 136),

"[i]t is hard to argue that 'labourers' in marginal or precarious employment – for example, on farms or construction sites – are privileged in any substantial sense relative to the households we included in the 'underclass'. [...] It is the unionized school teacher, car worker and even bus driver who are privileged relative to the working poor and underclass (although they are not nearly as privileged as the much richer, upper classes)."

⁷⁶¹ A Govindjee and O Dupper. "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa." (2011) 22 *Stellenbosch Law Review* 775 at 776, 793 and 797.

⁷⁶² Govindjee and Dupper 776.

⁷⁶³ The passage (at 792) that is of import here reads: "The right of access to social security and appropriate social assistance contained in section 27 of the Constitution may not, strictly speaking, be read in such a manner so as to automatically incorporate all components of the broader notion of social protection. The term 'social security' is normally understood in a relatively narrow sense. The social insurance and social assistance components of social security are, similarly, limited by the manner in which they are generally conceptualised and understood in practice."

⁷⁶⁴ At 797 they argue that social assistance is currently limited to state social grants, as provided for in the Social Assistance Act 13 of 2004. Any other measures to assist the unemployed, excluding social

In the conceptual framework proposed by Govindjee and Dupper,⁷⁶⁵ a distinction has to be drawn between unemployment security measures and unemployment protection measures. In their proposed framework, the former consist of unemployment insurance and unemployment assistance, which would properly fall within the ambit of social security. Unemployment protection measures, which consist of measures to prevent unemployment and employment creation measures, would not constitute social security.

These authors also express the view that the right to choose and practice a trade, occupation or profession freely and the right to fair labour practices have not been interpreted to include a right to work or to regulate what they term unemployment protection measures.⁷⁶⁶ The result, they argue, has been that policy developments in relation to employment creation operate in the absence of a legal framework.⁷⁶⁷ They argue that the absence of a legal framework in what is an important part of government's poverty alleviation and poverty elimination strategy is open to constitutional challenge.⁷⁶⁸

South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is important in this context, because this Covenant includes a right to work.⁷⁶⁹ As Chenwi and Hardowar note, the right to work in the ICESCR not only implies that rights holders must be able to seek work freely, but

insurance measures such as unemployment insurance, would therefore not fall within the definition of social assistance or social security more broadly.

⁷⁶⁵ Govindjee and Dupper 777.

⁷⁶⁶ Govindjee and Dupper 793.

⁷⁶⁷ Ibid.

⁷⁶⁸ Govindjee and Dupper 776.

⁷⁶⁹ Article 6 of the ICESCR (1966) available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> (Accessed: 17 May 2015) reads:

- “1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”

Article 7 then recognises the right to “just and favourable conditions of work”, while Article 8 entrenches basic organisational rights in the work context.

also imposes a positive obligation on states to work towards achieving that right.⁷⁷⁰ These authors argue that ratification of the ICESCR may have positive consequences for those seeking expanded benefits in relation to the right to work.

Mundlak states that the right to work generally has three components.⁷⁷¹ The first relates to liberty and protects freedom of occupational choice. This component is indeed protected in s 22 of the Constitution.⁷⁷² The second component relates to the right individuals have, and the corresponding obligations on states or employers to provide work. This is the component that is at issue here. The third component of the right aims at ensuring that the work provided is decent work. This component is arguably protected in the Constitution by the right to fair labour practices⁷⁷³ and the right to dignity.⁷⁷⁴

If we accept that only the second component of the right to work is not obviously protected in the Constitution, the issue is whether such protection can be sourced from the existing text or whether it can be secured through other means. Govindjee and Dupper suggest four methods that can be used to ensure accountability in respect of government's employment creation activities.

The first option would be to amend the Constitution to provide for a right they suggest would read as follows:

"Everyone has the right to have access to unemployment security, including the right to work. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."⁷⁷⁵

⁷⁷⁰ L Chenwi and R Hardowar. "Promoting Socio-economic Rights in South Africa through the Ratification and Implementation of the ICESCR and its Optional Protocol." (2010) 11(1) *Economic and Social Rights Review* 3 at 4.

⁷⁷¹ G Mundlak. "The Right to Work: Linking Human Rights and Employment Policy." (2007) 146(3-4) *International Labour Review* 189 at 192-193.

⁷⁷² It reads: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

⁷⁷³ Section 23(1) provides: "Everyone has the right to fair labour practices."

⁷⁷⁴ Section 10 reads: "Everyone has inherent dignity and the right to have their dignity respected and protected."

⁷⁷⁵ Govindjee and Dupper 798.

The difficulties inherent in this option are that it is dependent on strong political will and that it would be time- and resource-intensive. A speedier option, in Govindjee's and Dupper's view, is for government to pass legislation to regulate its own activities in respect of employment protection.⁷⁷⁶ By virtue of s 39(3) of the Constitution, such legislation would have constitutional support. That section provides that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." The relative weakness in this approach is that it is not clear that a right conferred by legislation would be accorded the same status as that conferred by the Constitution itself.

The third option, according to Govindjee and Dupper, is to use the existing constitutional text and values to recognise unenumerated rights.⁷⁷⁷ Unenumerated rights are those rights that are not explicitly provided for in the constitutional text.⁷⁷⁸ The Constitutional Court has refrained from recognising unenumerated rights.⁷⁷⁹ In a political climate in which courts have to navigate a fine line between protecting individual rights and maintaining their own institutional legitimacy, it is unlikely that courts would take what may be regarded as a drastic step.

The final option, which resembles the recognition of an unenumerated right, is to interpret an existing right expansively to cover challenges related to a right not expressly recognised in the Bill of Rights.⁷⁸⁰ Govindjee and Dupper argue that the right to dignity is the most obvious right that can be utilised in this way, with the right to life also offering some possibilities. In *Dawood*,⁷⁸¹ O'Regan J warned that the use of the right to dignity to incorporate interests not expressly protected must be used as a last resort. If there is a specific right in terms of which cases can be decided,

⁷⁷⁶ Govindjee and Dupper 793.

⁷⁷⁷ Govindjee and Dupper 795.

⁷⁷⁸ See R Krüger and A Govindjee. "The Recognition of Unenumerated Rights in South Africa." (2012) 27 *Southern African Public Law* 195, who write (at 195-196):

"Cases may occasionally give rise to issues not directly addressed by the fundamental rights enumerated in the Constitution and complete non-recognition of unenumerated rights may leave the claimants of such rights vulnerable."

⁷⁷⁹ Krüger and Govindjee 202.

⁷⁸⁰ Govindjee and Dupper 796.

⁷⁸¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 35-36.

that specific right must be utilised. The same principle would apply in respect of the right to life, and that is on the assumption that a court would be willing to apply the right to life in such an expansive fashion.

While I share Govindjee's and Dupper's views on the need for a legal framework to protect employment creation activities, I am of the view that there are good arguments to interpret the existing right to access to social security to include work creation activities undertaken by the state. Two possible means through which to effect a more expansive conception of social security exist. The first is to adopt a generous interpretation of social assistance to include initiatives such as public works programmes. Woolard, Harttgen and Klasen, for example, define social assistance as "transfers in cash or in kind [that] are made to deprived populations. These include public works programmes and cash transfer programmes."⁷⁸² Govindjee and Dupper, on the other hand, argue that employment creation initiatives undertaken by government – including public works programmes – do not constitute social assistance, as this term is limited to social grants.⁷⁸³

It is arguable that the fact that the Social Assistance Act⁷⁸⁴ (the SAA) does not make mention of public works programmes is relevant to the interpretation of the term 'social assistance' in the Constitution. A possible counter-argument is that the measures provided for in the SAA are not meant to exhaust the concept. At the heart of the inquiry is the statement in s 27 of the Constitution that the state has obligations to provide social assistance to those who are "unable" to provide for themselves and their dependants. The text is silent on whether this inability has to be located within the individual or whether it may also be caused by external factors

⁷⁸² I Woolard, K Harttgen and S Klasen. "The History and Impact of Social Security in South Africa: Experiences and Lessons." (2011) 32(4) *Canadian Journal of Development Studies/Revue Canadienne D'études du Développement* 357 at 358.

⁷⁸³ Govindjee and Dupper 797. S Van der Berg and K Siebrits. "Social Assistance Reform During a Period of Fiscal Stress." (2010) 4 seem to hold the same view in that they equate social assistance with the grants system. A Dekker and S Cronje. "Can Social Security Play a Role in Black Economic Empowerment?" (2005) 17(1) *South African Mercantile Law Journal* 19 at 25 explain the content of social assistance in a manner that may or may not include some employment creation programmes. These authors write:

"The South African social assistance system comprises of (a) social assistance grants for care-dependent persons; (b) financial awards to individuals for the social relief of distress; (c) special pensions, military pensions, gratuities and financial reparation for individuals who have suffered because of political confrontation; (d) financial awards to welfare organisations; and (e) state sponsored provision of social services, facilities and programmes."

⁷⁸⁴ Act 13 of 2004.

such as limited employment opportunities. For present purposes, I will assume that the restrictive definition of 'social assistance' is correct.

The second means through which to expand the ambit of the right to access to social security is to interpret the umbrella term of social security more generously. Ultimately, the difference between this approach and the constitutional amendment proposed by Govindjee and Dupper is not stark, as the interrelated and mutually supportive nature of the relationship between the rights in the Bill of Rights would allow for the intersection of a limited right to access to social security and a new right to unemployment security. Furthermore, the structure and the wording of the right to unemployment security they suggest is exactly the same as the existing right to access to social security. The only real difference between our proposals therefore lies in the interpretation of the term "social security".

Govindjee and Dupper do not explain fully why the ambit of the right to social security in the South African Constitution should be restricted to social assistance and social insurance. The only reason that is apparent from their exposition is that the term has traditionally been understood to include only those two components and that social security is related to, but distinct, from the broader notion of social protection. This form of reasoning is formal in nature,⁷⁸⁵ because it seems to suggest that 'social security' in s 27 must be interpreted to refer to only social assistance and social insurance, because that is how the term has been understood. It is not clear exactly who has been using the term in that restricted sense and for what purpose.

One possible justification for limiting the scope of social security is that government understands the term in that way and has been planning on that basis. The most obvious response is that government derives its power from the Constitution and has to comply with the Bill of Rights. Within the constitutional scheme, courts have the power to interpret and pronounce on what constitutional rights require of

⁷⁸⁵ A formal reason relies primarily on the authoritative origin of a legal rule. Substantive reasons, in contrast, would focus on social justifications for a rule (is it just, does it serve a good societal goal?) (See JC Froneman. "Legal Reasoning and Legal Culture: Our 'Vision' of Law." (2005) 16(1) *Stellenbosch Law Review* 3 at 4).

government.⁷⁸⁶ While government's views on what it should and can provide are relevant,⁷⁸⁷ it would be more appropriate to consider these views at the stage of determining government's obligations in particular instances, rather than to exclude all employment creation activities from the scope of the s 27 right. This is consistent with the approach the Constitutional Court has endorsed whereby the scope of rights is interpreted generously before limitations of these rights are considered.⁷⁸⁸

Furthermore, unemployment protection initiatives have been central to government's social and economic policies. These include the Expanded Public Works Programme, a national training layoff scheme in terms of which government provides training and allowances to employees during negotiated layoffs and an overall emphasis on skills development.⁷⁸⁹ Government clearly realises that it has obligations in this sphere. A court expanding the notion of social security, as understood in the South African Constitution, would therefore not be compelling government to perform activities which government is not already undertaking.

⁷⁸⁶ In *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (hereinafter referred to as "*TAC (No 2)*") paras 98-99, the Court stated:

"This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy. [...]"

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so."

⁷⁸⁷ Sachs J in *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (2) SA 794 (CC) para 155 recognises that in balancing competing rights and interests, courts may be faced "with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary."

⁷⁸⁸ In *S v Makwanyane and Another* 1995 (3) 391 (CC) para 100 Chaskalson P noted:

"Our Constitution [the Interim Constitution] deals with the limitation of rights through a general limitations clause. [...] [T]his calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of section 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves."

⁷⁸⁹ See T Cohen and L Moodley. "Achieving 'Decent Work' in South Africa?" (2012) 15(2) *Potchefstroom Electronic Law Journal* 320 at 324-327 for an overview of government's work creation policies.

Another possible justification for a limited conception of social security is that the ILO draws a distinction between social protection and social security, and that Convention 102 only makes provision for specified risks. Constitutional Court jurisprudence has emphasised that international law “offers guidance as to the correct interpretation of particular provisions” in the Bill of Rights.⁷⁹⁰ However, Convention 102 only sets minimum standards and does not compel states to adopt particular frameworks.⁷⁹¹ Similarly, General Comment No. 19 on Social Security recognises that “the elements of the right to social security may vary according to different conditions.”⁷⁹² It further requires that social security for disabled persons be provided “in a dignified manner”.⁷⁹³ It recognises the interrelationship between the rights to social security and to work by warning that institutionalisation (unless necessary for other reasons) “cannot be regarded as an adequate substitute for the social security and income-support rights of [disabled] persons, as well as rehabilitation and employment support, in order to assist persons with disabilities to secure work.”⁷⁹⁴

It is not necessary that a separate right to work should be recognised in South Africa in order to give effect to the ICESCR’s right to work. Interpreting social security widely to include unemployment protection could achieve compliance. Furthermore, the interrelation of the right to access to social security with the rights to substantive equality and dignity, along with an emphasis on the value of freedom, could ensure that disabled persons who are willing and able to work are given fair opportunities to do so.

An interpretation of the constitutional right to access to social security that includes access to social protection measures is appropriate for various substantive reasons. These reasons are of prime importance, because s 39(2) of the Constitution compels courts to interpretations of the Bill of Rights that “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” This requires an engagement with the concrete effects of particular interpretations.

⁷⁹⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35.

⁷⁹¹ ILO ‘Convention 102’.

⁷⁹² Para 10.

⁷⁹³ Para 20.

⁷⁹⁴ See fn 17 of UN ‘General Comment 19’.

Firstly, social insurance and social assistance⁷⁹⁵ measures fail to cover the most vulnerable people in South African society – those who are most socially insecure. These are the people who do not have access to any of the grants and who do not qualify for social insurance or, if they do, only qualify for a short period of time. The criticisms of the traditional concept of social security are underpinned by objections to its exclusion of situations that involve people who are most in need. Furthermore, as Kaseke points out,⁷⁹⁶ the traditional concept originated in circumstances that assumed that people would manage to find employment in the open labour market. This assumption does not hold true in contemporary South Africa.

The exclusionary nature of the South African social security system also has to be placed within historical context. Van der Berg summarises its development as follows:

“Under apartheid, the trappings of a welfare state for whites were created. Over time, social security was gradually extended to other groups, and recently social assistance benefits were equalised. This left South Africa with high social security levels for a middle-income developing country. However, the social security system still largely reflects the historical needs of vulnerable white groups under apartheid, among whom unemployment was minimal, given their preferential access to jobs and education. Thus the social security system now has inadequate provision for the most vulnerable, the unemployed.”⁷⁹⁷

A restrictive interpretation of what is meant by social security would leave unaddressed and, worse still, unquestioned, the historical roots of what originated as a deliberately exclusionary system. It may be that a more generous interpretation does not have a discernable impact because of the internal limitation of the right, but at least it does not foreclose the possibility of holding government accountable in respect of its employment creation obligations. The fulfillment of these obligations would be most crucial to the life chances of those living on the bottom rungs of the socio-economic ladder.

⁷⁹⁵ Here I am referring to social assistance in the narrow sense, i.e. targeted cash transfers to categorically eligible indigent persons.

⁷⁹⁶ See 6.2.3.1 fn 730 and fn 731.

⁷⁹⁷ Van der Berg 481.

Commentators have argued that the Bill of Rights, through its justiciable socio-economic rights and other rights, envisions that everyone should have an adequate standard of living in that their basic needs are met.⁷⁹⁸ In *Grootboom*, the Constitutional Court stated:

“The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.”⁷⁹⁹

The inclusion of social assistance, social insurance and active labour market measures under one right would recognise the central purpose underpinning these components, which is to ensure an adequate standard of living for everyone. There would be a holistic consideration of the policy measures government is undertaking in relation to social security for particular groups. In the case of some disabled people, for example, government could be required to facilitate the realisation of the right to access to work, rather than to provide social assistance. In other instances, government may have duties to promote and to provide, for example if the provision of assistive devices is recognised as assistance.

Govindjee and Dupper argue that, at present, unemployed youth who do not qualify for any of the social assistance grants or for social insurance would be able to challenge government’s failure to provide them with social assistance, because the

⁷⁹⁸ See, for example, S Liebenberg. “South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?” (2002) 6(2) *Law, Democracy and Development* 159; S Liebenberg. “Needs, Rights and Transformation: Adjudicating Social Rights in South Africa.” (2006) 17(1) *Stellenbosch Law Review* 5; and D Bilchitz. “The Right to Health Care Services and the Minimum Core: Disentangling the Principled and Pragmatic Strands.” (2006) 7(2) *Economic and Social Rights Review* 2.

⁷⁹⁹ Para 44.

right is accorded to “everyone” in terms of s 27.⁸⁰⁰ Any government attempts to create employment for such youths through expanded public works programmes would not assist government in its response if the limited conception of social security were used. However, if an expanded and, I argue, more purposive conception is used, employment creation measures would be considered part of the overall social security provisioning that government is undertaking. It is therefore a more accurate representation of government’s activities in the social security sphere.

Even if my argument in respect of the ambit of “social security” is not accepted, it is arguable that unemployment prevention and unemployment protection measures can be constitutionalised by using one of the methods suggested by Govindjee and Dupper. If that were the case, several objections could be raised. The most obvious one is that the constitutional drafters would have expressly included a right to work if they had wished for it to be part of the Constitution. After all, they would have seen examples of a right to work in several international instruments and foreign constitutions.⁸⁰¹ It is therefore not open to a court to infer a right that was specifically omitted.

One potential response lies in the nature of the rights provisions in the Constitution and the drafting strategy adopted in respect of the rights in the Bill of Rights. Du Plessis, who convened the Technical Committee on Fundamental Rights during the negotiation of the Interim Constitution, explains that the rights in the Bill of Rights were purposely drafted “as general norms, as broadly as possible, and reliance on lists of specific and detailed guarantees and conditions [were] avoided.”⁸⁰² They were drafted in a context of deep disagreement and ultimate compromise, so every effort was made to simplify the text, aid accessibility and interpretation, avoid unintended restrictions that may result from too-detailed lists and allow for the

⁸⁰⁰ It is not clear whether the youths would be able to prove that government’s failure to provide them with social assistance is unreasonable, as the applicants in *Khosa* were able to do. Let us assume for present purposes that they would be able to show that their exclusion would be unreasonable.

⁸⁰¹ In *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) para 106, Ackermann J noted that “the internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights.”

⁸⁰² L Du Plessis. “The Genesis of the Chapter on Fundamental Rights in South Africa’s Transitional Constitution.” (1994) 9 *South African Public Law* 1 at 12.

interpretation of rights to evolve and grow as the context in which these rights were interpreted changed.⁸⁰³

The socio-economic rights, in particular, were the subject of disagreement and uncertainty. Haysom, writing in 1992, noted that South Africans seemed to be in general agreement that civil and political rights were necessary, but were more equivocal on whether socio-economic rights were indispensable.⁸⁰⁴ Brevity and simple language therefore would have been even more important in respect of these rights.

An examination of the preliminary revised text of the African National Congress's (ANC's) draft Bill of Rights shows specific reference to a right to work in a composite right entitled "Freedom from Hunger, the Right to Shelter and the Right to Work".⁸⁰⁵ It read:

"Special attention shall be paid to securing freedom from hunger, reducing and where possible eliminating homelessness, unemployment and illiteracy, and to providing basic utilities, such as water, electricity and waste disposal for all."⁸⁰⁶

This draft Bill of Rights also enshrined particular rights for disabled persons, including the following:

"Legislation shall provide for measures to promote the progressive opening up of employment opportunities for disabled men and women, the removal of obstacles to the enjoyment by them of public amenities and their integration into all areas of life."⁸⁰⁷

⁸⁰³ Ibid. In *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) (at para 59), O' Regan J emphasised that what a right requires "will vary over time and context."

⁸⁰⁴ N Haysom. "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights." (1992) 8 *South African Journal on Human Rights* 451 at 452. He notes (at 453) that people's political affiliations did not necessarily determine their views on socio-economic rights. For example, the ANC had formally endorsed the inclusion of socio-economic rights in a Bill of Rights, but some commentators within the party had expressed reservations about the legal, political and economic implications of socio-economic rights and property rights.

⁸⁰⁵ ANC 'Bill of Rights'.

⁸⁰⁶ Article 11(5).

⁸⁰⁷ Article 9(2).

From this document, it is clear that one of the biggest role players in the negotiation process that led to the adoption of the Interim Constitution, and the current governing party, regarded positive steps to prevent unemployment, particularly for disabled people, as a socio-economic entitlement that needs to be protected and promoted. While this does not negate the possibility that reference to such measures could have been deliberately omitted, it allows for the possibility that it could have been subsumed into a more broadly stated right such as that to access to social security. This is so particularly in light of the fact that the social security concept includes measures to prevent social insecurity and to (re)integrate, where social risks have eventuated. We have already seen that other components of the ICESCR right to work are protected by rights such as the right to freedom of occupation, trade or profession and the right to fair labour practices.⁸⁰⁸ In my view, it would therefore not be far-fetched to regard the second component of the right to work as part of a more holistic conception of what it means to be socially secure.

The second set of objections to imposing a positive obligation on government in respect of unemployment protection and unemployment prevention is that it could encourage people creating and accepting employment that does not comply with minimum working standards.⁸⁰⁹ However, as Mundlak points out, the third component of the right to work recognised at international level aims to protect the qualitative dimension of work.⁸¹⁰ The rights to fair labour practices and to dignity, as well as legislative and other measures to protect work standards, could alleviate the concern that the work provided would be exploitative and inconsistent with basic labour standards.

Another argument against constitutionalising work protection measures is that it may legitimise government decreasing its focus on social assistance and social insurance.⁸¹¹ These concerns can be addressed if a holistic approach to social security is adopted. Retrogressive measures are generally regarded as

⁸⁰⁸ See 6.2.3.2.

⁸⁰⁹ Govindjee and Dupper 794.

⁸¹⁰ Mundlak 193.

⁸¹¹ Govindjee and Dupper 794.

unreasonable.⁸¹² Furthermore, the intersection of substantive equality and socio-economic rights may assist individuals who are aggrieved by their exclusion from certain benefits.

A fourth class of objections to unemployment prevention and unemployment protection measures is based on the premise that work in capitalist conditions is inherently exploitative and that it therefore should not be a social good promoted by a Constitution or any rights instrument. On this view, active labour market measures would often be experienced as a duty to work, particularly if people do not have the freedom to choose what they want to do or in circumstances that make work a condition precedent for benefiting from social assistance or social insurance schemes.⁸¹³ A different, but linked, criticism is that such measures would valorise wage labour and diminish the social value of non-paying work such as care work, volunteer work and artistic expression.⁸¹⁴

Mundlak's response⁸¹⁵ to these objections is that the emphasis can be placed on dignified work and linking the implementation of the right to the purposes of enshrining the right in the first place. Work does not have to equal access to the paid labour market, but can instead be linked to access to meaningful participation in social, political and economic life. Furthermore, the promotion of wage labour does not necessarily entail a dismissal or depreciation of other forms of work. I agree with these broadly framed arguments and expand on them below in relation to access to work for disabled persons.⁸¹⁶

A last category of objections to the right to work or active labour market interventions resembles those that relate to the justiciability of socio-economic rights in general. Concerns in this category relate to the difficulties in defining the ambit of social rights

⁸¹² In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 34, the Court stated that "at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)" and has to be justified under the general limitations clause (s 36) of the Constitution. See, also, UN 'General Comment 19' para 42 for the view that there is a strong presumption that retrogressive measures in respect of the right to social security is prohibited under the ICESCR.

⁸¹³ Mundlak 196.

⁸¹⁴ Ibid.

⁸¹⁵ Mundlak 197.

⁸¹⁶ See 6.3.3 and 6.3.4.

and determining when they have been infringed; the perceived unsuitability of courts to pronounce on government's positive obligations in the sphere of economic policy; the fact that government has little control over the labour market; and that creating rights that cannot be enforced adversely affects the legitimacy of the Bill of Rights as a whole.⁸¹⁷

Broadening the ambit of an existing socio-economic right would not be materially different from other socio-economic rights that have been held to be justiciable. The Constitutional Court has stated that the fact that socio-economic rights would often require courts to make decisions that have budgetary implications does not require a court to perform functions that are very different from those they assume when deciding cases involving civil and political rights.⁸¹⁸ Furthermore, the fact that government does not have total control of the resolution of a problem does not mean that it has no obligation in respect of alleviating the effect of that problem or to address it in some other ways. Its obligations are stated in flexible terms and can be applied with due awareness of the limitations under which government functions and the constrained role of the courts in areas affecting economic and social policy. It is to these limitations that we now turn.

6.2.4 Limitations on government's obligations in respect of access to work

There would be considerable limitations on government's obligations in respect of active labour market measures. The right is to "access to social security", not to social security. Government therefore would not have a duty to provide work in all instances, but would have a duty to protect the right from interference by others and would also have the duty to facilitate employment for those who need support to realise the right.

Section 27(2) delimits the state's obligations in respect of the right to access to social security. In general, the state is required to (i) take reasonable legislative and other

⁸¹⁷ Mundlak 194-195.

⁸¹⁸ *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 77.

measures, (ii) within its available resources, (iii) to ensure the progressive realisation of the right.

6.2.4.1 Reasonable legislative and other measures

The reasonableness, or otherwise, of a particular state programme or scheme has to be determined on a case-by-case basis.⁸¹⁹ Although considerable academic debate has raged over the desirability of such an open-ended standard against which to test government's performance of its s 27 obligations, it is clear that some general principles can be distilled from the Constitutional Court's jurisprudence.

For present purposes, it bears noting that a government programme has to be reasonable in both its inception and implementation.⁸²⁰ It is therefore not just legislation that will be subject to constitutional scrutiny, but state policies and programmes implemented in terms of these policies. This does not mean that a court will substitute its opinion for that of the executive and the legislature. The Constitutional Court has recognised that there may be a variety of measures that are reasonable and that courts are ill-suited to adjudicate upon matters that may have multiple social and economic consequences.⁸²¹

With regards to implementation, an important factor is whether the plan is capable of review and whether necessary changes can be made in response to changing circumstances. This was one of the important factors that led the Court in *Mazibuko* to hold that the City of Johannesburg's free basic water policy was reasonable.⁸²²

⁸¹⁹ *Grootboom* para 92.

⁸²⁰ *Grootboom* para 42.

⁸²¹ *TAC (No 2)* para 38; *Grootboom* para 41.

⁸²² At para 95, O'Regan J stated: "If the City had not continued to review and refine its Free Basic Water policy after it was introduced in 2001, and had taken no steps to ensure that the poorest households were able to obtain an additional allocation, it may well have been concluded that the policy was inflexible and therefore unreasonable. This would have been so, in particular, given the evidence that poorer households are also often larger than average and thus most prejudiced by the 6 kilolitre cap. However, the City has not set its policy in stone. Instead, it has engaged in considerable research and continually refined its policies in the light of the findings of its research."

Another important component of reasonableness is whether attempts were made to engage meaningfully with people who would be affected by the way in which the state performs its obligations in respect of a particular right. This duty to engage is said to be based in treating marginalised people with dignity, as well as to find cooperative processes through which to balance competing interests.⁸²³

In the words of Sachs J in *Port Elizabeth Municipality v Various Occupiers*:

“[T]he procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.”⁸²⁴

The Constitutional Court has also emphasised that a reasonable government measure would take into account the needs of the most vulnerable people and make provision for short-, medium- and long-term needs.⁸²⁵ In *Grootboom*, for example, a housing policy had not made provision for the temporary housing of people who lacked basic shelter and was therefore found to be unreasonable.⁸²⁶

6.2.4.2 Available resources

The Constitutional Court has emphasised that the socio-economic rights in ss 26 and 27 of the Constitution are themselves limited by a lack of resources.⁸²⁷ The obligation to provide access to work will therefore be limited by the resources at government's disposal. Resources may include government's financial means, its

⁸²³ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) paras 10, 15-16.

⁸²⁴ 2005 (1) SA 217 (CC) para 39.

⁸²⁵ *Grootboom* para 43.

⁸²⁶ At para 66.

⁸²⁷ See, for example, *Soobramoney* para 11; *Grootboom* para 34; *TAC (No 2)* para 39; and *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) paras 49-50, 56.

ability to direct resources through regulation and the likely impact of any regulatory activities if such activities are implemented reasonably.

An important issue is whether it is practicable for government to undertake certain tasks. In *Mazibuko*, for example, the applicants argued that it was unreasonable for the City of Johannesburg to allocate free water per property stand rather than per person.⁸²⁸ The Constitutional Court held that it would have been “an enormous administrative burden”, if it were possible at all, to keep track of how many persons were living on a particular property stand in order to determine the allocation of free water to that stand.⁸²⁹

Generally courts are not likely to decide whether resources are available for particular schemes or whether certain resources should be employed to achieve certain desired goals, but where it is clear that resources are available and that a specific action is required and can be taken, a court may order that such action be taken.⁸³⁰ This cautious approach is encapsulated by the following dictum by the Constitutional Court in *TAC (No 2)*:

“The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”⁸³¹

⁸²⁸ At para 82.

⁸²⁹ At para 84.

⁸³⁰ MP Olivier. Constitutional Issues. In: MP Olivier, N Smit and ER Kalula (eds). *Social Security: A Legal Analysis*. (2003) 45 at 76.

⁸³¹ At para 38.

6.2.4.3 Progressive realisation

The Court has declined setting a minimum core for each of the socio-economic rights. In the course of rejecting a minimum core in respect of the right to access to water, O'Regan J said the following in *Mazibuko*:

“The purpose of the constitutional entrenchment of social and economic rights was [...] to ensure that the state continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the state would be able to furnish citizens immediately with all the basic necessities of life.”⁸³²

The injunction to progressively realise the right therefore means that it is accepted that the right may not be immediately realisable.

However, as Yacoob J emphasised in *Grootboom*: “It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.”⁸³³ The Constitution thus requires a realistic, comprehensive plan to progressively facilitate the realisation of the right.

South Africa ratified the ICESCR on 12 January 2015,⁸³⁴ which means that it is now bound by the provisions of this Covenant. An important consequence is that South Africa’s socio-economic jurisprudence has to develop in harmony with the normative standards set by the ICESCR. While the Constitutional Court has taken guidance on socio-economic rights from international law, one of the principles it has not endorsed is that socio-economic rights have a minimum core. That refusal may now have to be reconsidered, which will be to the advantage of those claimants seeking orders aimed at facilitating fulfilment of their basic needs.

⁸³² At para 58.

⁸³³ At para 45.

⁸³⁴ See UN Treaty Collection. “3. International Covenant on Economic, Social and Cultural Rights.” (2015) https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (Accessed: 15 May 2015).

6.3 The right to access to work for disabled people: Selected issues

If these general principles in respect of a right to access to work are taken into account, what issues have to be addressed in respect of disabled people's access to work? It is not possible to canvass issues in depth here, nor to provide an exhaustive list of what needs to be addressed. However, there are several points of interest that would have to be borne in mind when government's obligations in respect of access to work for disabled people are considered.

6.3.1 Improved statistics and information on disabled people's access to work

Accurate information is indispensable to policymaking and implementation.⁸³⁵ Such measurements serve as bridges between broadly stated entitlements and the details of what must be provided to whom and at what time. This reality is recognised in the CRPD and in constitutional jurisprudence. The CRPD requires states parties to "collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect" to that Convention.⁸³⁶ This information is to be used to, inter alia, help assess the implementation of states parties' obligations and "to identify and address the barriers faced by persons with disabilities in exercising their rights."⁸³⁷

While this explicit requirement in the CRPD can be used to put pressure on government to collect relevant information, it is only directly enforceable at the international level. This is because it has not been incorporated into South African law.⁸³⁸ One domestic-level remedy to compel appropriate data collection can be

⁸³⁵ NE Groce. "Disability, Poverty, Human Rights and the Need for Accurate Data to Promote Action." (2009) 3 *ALTER, European Journal of Disability Research* 185:

"The need for empirical data is imperative if persons with disabilities are to be effectively reached by programs that address social inclusion and poverty reduction. This need for solid data is all the more important as the field of global development is currently framed by the Millennium Development Goals which emphasize the need for measurement, monitoring and evaluation to track progress or identify impediments to progress. Empirical data has become the lingua franca of global development."

⁸³⁶ Article 31(1).

⁸³⁷ Article 31(2).

⁸³⁸ See TP Van Reenen and H Combrinck. "The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years." (2011) 8(14) *Sur International Journal on Human Rights*

derived from the positive obligations imposed on government in terms of progressively realizable socio-economic rights.

Due to the multi-faceted and non-static nature of disability and the different purposes for which disability is assessed, disability statistics are generally not comparable over time and location, and may also be difficult to interpret.⁸³⁹ The inadequacy of disability statistics worldwide led to the formation in 2001 of the Washington Group on Disability Statistics under the auspices of the UN Statistics Division.⁸⁴⁰ Its primary function was to address “the scarcity and general poor quality of data on disability, especially in developing countries, and the lack of internationally comparable measures, even among developed countries.”⁸⁴¹

The Washington Group has shifted the focus from an impairment-based one that led to questions such as “Do you have a disability?” to an approach steeped in the ICF.⁸⁴² The emphasis of the group has been to develop questions that elicit comparable information on “experienced difficulties in basic actions, more complex activities and barriers to participation.”⁸⁴³

Schneider, Dasappa, Khan and Khan write that a StatsSA survey found that the Washington Group questions elicited more effective disability prevalence figures

132 at 139-140. Section 231(2) of the Constitution provides that an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. It becomes law in South Africa if it is enacted into law by national legislation, but a self-executing provision that has been approved by Parliament is law unless it is inconsistent with the Constitution or an Act of Parliament (s 231(4)); *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] 8 BCLR 1015 (CC) para 26. In *Glenister v President of the RSA and Others* 2011 (3) SA 347 (CC) para 99, the Court set out the three ways in which this enactment may be done: (a) by embodying the provisions of the agreement into an Act, (b) by attaching the agreement as a schedule to an Act, or (c) by enacting enabling legislation that authorizes the executive to bring the agreement into effect as domestic law by way of proclamation or notice in the Government Gazette.). It is not clear when a provision is self-executing, but the nature of the agreement and how it fits in with domestic law are factors that seem to be relevant (L Chenwi. “Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament.” (2011) 15 *Law, Democracy and Development* 1 at 11).

⁸³⁹ JH Madans, ME Loeb and BM Altman. “Measuring Disability and Monitoring the UN Convention on the Rights of Persons with Disabilities: The Work of the Washington Group on Disability Statistics.” (2011) <http://www.biomedcentral.com/1471-2458/11/S4/S4> (Accessed: 6 February 2015) (hereinafter referred to as “Washington Group”) 3.

⁸⁴⁰ Washington Group 2.

⁸⁴¹ Ibid.

⁸⁴² Ibid.

⁸⁴³ Ibid.

than the “Do you have a disability?” type questions used in the 2001 South African Census.⁸⁴⁴ The Washington Group questions have been used since the 2009 Household Survey and were used in the 2011 National Census.⁸⁴⁵

However, it is instructive that these authors note the following:

“The findings are not conclusive as to the effectiveness of identifying the population at risk for disability-related disadvantage and discrimination using only basic domains of functioning, rather than including questions on more complex domains. Further research is required to understand these findings.”⁸⁴⁶

The StatsSA ‘Disability Profile’ also implies that the information gathered could not be used to determine the weight to be attached to the various causes of the employment inequalities experienced by disabled persons.⁸⁴⁷ Thus, although the questions used in censuses have developed and become more nuanced, the emphasis is still on individual limitations on functioning. This is consistent with the concerns expressed by commentators that the ICF approach and interactive approaches generally may still attach more weight to individual factors rather than to environmental and social barriers.⁸⁴⁸

⁸⁴⁴ M Schneider, P Dasappa, N Khan and A Khan. “Measuring Disability in Censuses: The Case of South Africa.” (2009) 3(3) *ALTER, European Journal of Disability Research* 245 at 262.

⁸⁴⁵ StatsSA ‘Disability Profile’ 20. The report (at 14-16) expands on the evolution of disability-related questions in censuses. It explains the findings of two surveys conducted by StatsSA to determine whether the Washington Group (WG) approach ought to be followed in South Africa:

“Results from both studies showed that use of the WG questions led to much higher disability estimates compared to the traditional questions of ‘Do you have any serious disability that prevents your full participation in life activities?’ In both studies, the term ‘difficulty’ instead of ‘disabled’ seemed to be more acceptable among persons with impairments who did not identify themselves as being disabled. Furthermore, the use of the response options that allow for more nuanced responses rather than a stark ‘Yes/No’ response allowed people with mild or moderate difficulties to report these. If they were required to choose between ‘Yes’ and ‘No’ they may have responded ‘No’. Both studies recommended use of the WG questions for Census 2011.”

⁸⁴⁶ Schneider, Dasappa, Khan and Khan 262.

⁸⁴⁷ StatsSA ‘Disability Profile’ 11. The relevant part reads:

“This low representation of persons with disabilities in the work place leaves a number of questions unanswered: is it noncompliance, prejudice or insufficient skills, or a combination of factors including environmental obstacles, (sic) Misconceptions and prejudice about capabilities of persons with disabilities to perform certain jobs remain one of the major obstacles to employment opportunities and their exclusion from opportunities for promotion in their careers.”

⁸⁴⁸ See 2.3.1.1.

If one compares the Washington Group questions with those suggested by Abberley in the previous chapter,⁸⁴⁹ it is notable that the latter set of questions is more explicitly focused on social and environmental conditions and circumstances that prevent or make it difficult for people to function. These shortcomings do not suggest that the census information is not useful – it can clearly guide policy planning and implementation. However, it does not provide much insight into social and environmental barriers to individual functioning and is therefore of limited use in planning regarding positive actions to be taken to remove such barriers.

Censuses are perhaps not the most appropriate mechanisms through which to elicit information about discrimination and structural inequalities in the employment sphere. One potential source of information is the reports completed by designated employers in terms of the EEA.⁸⁵⁰ However, such reports do not have to indicate how many people with disabilities had applied for employment with a particular employer and why they were not interviewed, appointed or both. In terms of recruitment figures, employers are required to indicate new recruits for the reporting period in terms of their race and gender, but the form states that people with disabilities must be included within those categories.⁸⁵¹ The result is that recruitment figures are not disaggregated based on disabilities. This is in contrast to the existing workforce profile, which includes people with disabilities as a separate category.⁸⁵²

The information in the CEE reports, unsurprisingly, mirrors that disclosed in the employer reports, as the former are compiled through aggregation of all employer reports. The latest CEE report therefore has information on disability representation in existing workforces, but expressly indicates that no separate workforce movement data is available for disability.⁸⁵³

It would seem that targeted research that tracks disabled work seekers' experiences when they apply for work is needed to gain more insight into the barriers that operate

⁸⁴⁹ See 5.7.1.

⁸⁵⁰ See Form EEA2 in the EE Regulations.

⁸⁵¹ See Item 2, Form EEA2 of the EE Regulations.

⁸⁵² See Item 1.2, Form EEA2 of the EE Regulations.

⁸⁵³ CEE 28, 35, 42 and 47.

to exclude them. Employment service providers could provide support for such research, as could DPOs and other organisations to which disabled work seekers have access. The scope and design of such research endeavours fall beyond the scope of this work.

6.3.2 Positive non-discrimination duties and affirmative action duties as components of unemployment protection

In the previous chapter I set out the positive duties that employers are expected to perform to facilitate access to employment for disabled persons. Government also has a crucial role to play in the enforcement of these obligations. There are indications that the resources devoted to the enforcement of the EEA have not been adequate and that labour inspectors are unable to perform the necessary functions. The question that arises is whether there are ways in which to hold government accountable if it fails to implement or enforce positive duties in respect of access to work.

One mechanism is to argue, on the basis of s 9(1) of the Constitution, that government is not protecting aggrieved persons' right to "equal protection and benefit of the law".⁸⁵⁴ In particular, it is not clear whether the standard to be applied is rationality or one of general fairness.⁸⁵⁵ It is also not clear whether a comparator has to be identified to show that aggrieved persons have been treated less favourably than those in comparably similar positions.⁸⁵⁶ The latter requirement, in particular, may cause difficulties.

Strategically, if unemployment protection and unemployment prevention measures are accepted as falling within the scope of s 27(1) of the Constitution, the assessment of government's performance in regulating positive non-discrimination duties and affirmative action duties that impact on disabled persons' access to work can occur within the framework of s 27(2). The jurisprudence emphasises that

⁸⁵⁴ See *Albertyn and Goldblatt v CLoSA* 35.3(c).

⁸⁵⁵ *Ibid.*

⁸⁵⁶ *Ibid.*

programmes must be reasonable in their inception and implementation and that adequate resources must be made available to achieve the stated objectives. As discussed in the previous chapter, the limited number of labour inspectors, the reported shortcomings in the training of these labour inspectors and the time constraints on labour inspectors when enforcing employment equity may give rise to allegations that government's failure to enforce employment equity constitutes a failure to put in place reasonable measures to facilitate unemployment protection.⁸⁵⁷

I do not suggest that it will always be strategically beneficial to place reliance on s 27 rather than s 9. It may be that the uncertainty about the scope of s 27 and other considerations render reliance on s 9 the preferable approach. However, pointing out the social security implications of the regulatory failure may assist aggrieved parties. The constitutional principles on reasonableness, available resources and progressive realisation may also provide a clearer framework within which to assess government's compliance with its constitutional obligations.

6.3.3 Interrelationship of social assistance, social insurance and work

In many instances, the various arms of social security are assessed separately. The focus, for example, would be the exclusion of certain groups from social assistance or the coverage or benefits of a social insurance scheme. In my view, however, an important issue for disabled people – reflected in the discussions in Chapters 2 and 4 – is that their exclusion from productive work is at the heart of their exclusion from social activities and the social life of their communities more generally.⁸⁵⁸ An approach to the social security of disabled people that is disproportionately skewed in favour of cash transfers to disabled persons would therefore not be effective in addressing one of the root causes of many disabled people's social exclusion.

This argument is made with due cognisance of the dangers of exposing disabled people who are unable or who do not want to work to judgements that they should 'earn their keep' rather than relying on state assistance. A holistic approach would

⁸⁵⁷ See 5.5.3.

⁸⁵⁸ See 2.3 and 4.5.

take care in distinguishing between such persons from those who want to and are able to work, but who are prevented from doing so. In the words of Weber, “the aim of the disability rights movement is not integration into the workforce for integration’s sake but integration into society for the sake of dignity and equality of people with disabilities.”⁸⁵⁹ This intersection of social security and equality is one of the reasons for me suggesting that the value of freedom, either independently or as part of dignity, should be developed to underpin the promotion of access to work for disabled persons.

In terms of transformative equality, the promotion of more active forms of inclusion would generally be a positive development and consistent with a constitutional ethos built on “freeing the potential of each person”.⁸⁶⁰ In this regard, Sabates-Wheeler’s and Devereux’s advocacy of what they call “transformative social protection” is prescient.⁸⁶¹ They emphasise that long-term poverty reduction has to be based on the creation of positive relationships between “livelihood security and enhanced autonomy or empowerment.”⁸⁶² This notion is consistent with Stein’s argument that it would violate disability human rights to fashion and implement “presumably well-intentioned yet paternalistic welfare systems that provide subsistence to people with disabilities in lieu of workplace participation.”⁸⁶³

Disabled People South Africa seems to have worked from this premise when it specifically advocated for a right to work for disabled people in the ANC draft Constitution and emphasised the social inclusion of disabled people in all spheres. Work is not just about money – as Mundlak puts it, “[w]ork is about income, about individual fulfilment, about the constitution of one’s identity, about social inclusion”⁸⁶⁴ In a context in which the participation of disabled persons in the formal labour force

⁸⁵⁹ MC Weber. “Disability Rights, Welfare Law.” (2011) 32(6) *Cardozo Law Review* 2483 at 2505.

⁸⁶⁰ Preamble of the Constitution.

⁸⁶¹ R Sabates-Wheeler and S Devereux. “Social Protection for Transformation.” (2007) 38(3) *IDS Bulletin* 23.

⁸⁶² *Ibid.*

⁸⁶³ Stein ‘Human Rights’ 103-104.

⁸⁶⁴ Mundlak 189.

appears to be regressing,⁸⁶⁵ proactive strategies to shift social protection measures to promote employment are imperative.

Viewing unemployment protection and unemployment prevention as part of social security or, at least, as a socio-economic good may also hold advantages for policy coherence. Commentators have argued that there is an apparent paradox between disability rights' focus on social causes of disability and the provision of social assistance for disabled people, especially because the latter is the more established and often still the predominant element of social security.⁸⁶⁶ A holistic approach would cement the idea that social security is not limited to cash transfers and does not exclude the active participation of disabled persons. It would also recognise that the promotion of access to work for disabled people does not negate the need for social assistance to disabled persons.⁸⁶⁷

On the contrary, a holistic approach may reinforce that a combination of measures may be appropriate to promote the rights of disabled persons. Lorenzo, reporting on a study in which disabled women who live in wooden shacks in peri-urban areas outside Cape Town related their "experiences of what helped or hindered their social and economic development since becoming disabled", relayed the multi-faceted struggles these women revealed.⁸⁶⁸ They struggled to provide for their families with their grants and sometimes by running small businesses. They faced discrimination, exploitation and abuse within their families. They reported limited opportunities for them to develop skills that would help them to find work or run their own businesses.

⁸⁶⁵ See 1.1.

⁸⁶⁶ See, for example, Weber (at 2501) who argues that some might view social assistance as based on charity and begging, which is precisely what the disability rights movement has condemned as inimical to true social equality. See, also, L Waddington and M Diller. "Tensions and Coherence in Disability Policy: The Uneasy Relationship Between Social Welfare and Civil Rights Models of Disability in American, European and International Employment Law." (2000) <http://dredf.org/international/waddington.html> (Accessed: 6 February 2015) 2: "In various ways, people with disabilities are told they should work, but are simultaneously encouraged to stay home or shunted into segregated work settings. Employers are instructed to provide jobs, and yet are excused from doing so."

⁸⁶⁷ Weber (at 2502-2503) notes that "[i]t is hardly a retreat from anti-discrimination efforts to recognize that public assistance on the basis of disability needs to continue as long as discrimination on the basis of disability persists."

⁸⁶⁸ T Lorenzo. "No African Renaissance without Disabled Women: A Communal Approach to Human Development in Cape Town South Africa." (2003) 18(6) *Disability and Society* 759 at 766-768.

The research team in the above study facilitated a process through which these disabled women could create parallel narratives that emphasised their “strengths and spirit of survival.”⁸⁶⁹ Lorenzo highlights the findings that community-based rehabilitation has to focus on more than just rehabilitation and that equalisation of opportunities and social integration also need to be achieved.⁸⁷⁰ She suggests that some of the aspects that warrant attention include the development of “emotional resourcefulness”, the “nurturing of children and families in disability issues” and “renewing spirituality and Ubuntu in disability and development programmes.”⁸⁷¹

Government can create programmes that would provide broad-based support to persons in similar situations to the women in the study. Some relevant duties states parties undertook to perform in terms of the CRPD include obligations to raise awareness about disability issues within families and communities;⁸⁷² actively promote work for persons with disability;⁸⁷³ ensure disabled persons’ freedom from exploitation, violence and abuse;⁸⁷⁴ take measures that allow disabled persons to

⁸⁶⁹ Loreno 769.

⁸⁷⁰ Lorenzo 772.

⁸⁷¹ Ibid.

⁸⁷² Article 8 of the CRPD reads:

“1. States Parties undertake to adopt immediate, effective and appropriate measures:

- To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;
- To promote awareness of the capabilities and contributions of persons with disabilities.

Measures to this end include:

- a. Initiating and maintaining effective public awareness campaigns designed:
 - i. To nurture receptiveness to the rights of persons with disabilities;
 - ii. To promote positive perceptions and greater social awareness towards persons with disabilities;
 - iii. To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;
- b. Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;
- c. Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;
- d. Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.”

The Taylor Committee Report No. 9 at 370 noted: “[T]he need for clear, accessible information for people living with disability, their families, and their supporters has long been recognized, yet this remains a principle [sic] weakness in the system.”

⁸⁷³ Article 27.

⁸⁷⁴ Article 16.

live independently and as included members of their communities⁸⁷⁵ and facilitate the personal mobility of disabled persons.⁸⁷⁶

6.3.4 Network of social security laws that are relevant to access to work

In light of the holistic approach I argued for in the previous section, it is necessary to consider social security laws that are relevant to how disability is constructed and to disabled persons' access to work. It is not possible to discuss all the technical aspects of these laws here, given their breadth. Such aspects would offer fertile ground for future research. In a context in which disabled persons struggle to access work, it is important to consider the impact of these laws.

The guiding principle that animates the discussions of these laws is the need for the creation of a comprehensive, integrated system of social protection.⁸⁷⁷ Such a system has to be alive to the realities of contemporary South Africa and its history. Furthermore, integration has to occur at various levels – policy-making, institutional coordination, service delivery arrangements, benefit design and information sharing.⁸⁷⁸ The subsequent discussions of various social security regulatory frameworks have to be understood in the context of these principles.

6.3.4.1 The regulatory framework for social assistance

The SAA and its regulations provide for the payment of disability grants, grants-in-aid⁸⁷⁹ and social relief of distress,⁸⁸⁰ all of which may assist disabled persons in

⁸⁷⁵ Article 19.

⁸⁷⁶ Article 20.

⁸⁷⁷ M Olivier, O Dupper and A Govindjee. "Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives." (2011) 22(2) *Stellenbosch Law Review* 396 at 399.

⁸⁷⁸ Olivier, Dupper and Govindjee 398.

⁸⁷⁹ Section 12 of the SAA provides that a person is eligible for a grant-in-aid if he or she meets the general requirements set in s 5 of the Act and if he or she "is in such a physical or mental condition that he or she requires regular attendance by another person." Regulation 5 sets additional requirements, including that the person concerned must be in receipt of a disability grant, an older person's grant or a war veteran's grant and must be certified by a medical practitioner as meeting the requirement of s 12 of the SAA. Anyone housed in a state institution is ineligible for the grant-in-aid.

some way. However, the conception of disability in the SAA and its regulations is one steeped in the medical model of disability. In order to qualify for a disability grant, an applicant has to show that he or she is, “owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.”⁸⁸¹ The SAA itself does not contain a definition of disability. The regulations provide that a “disability is confirmed by an assessment,”⁸⁸² and define an “assessment” as “the medical examination by a medical officer of a person or child in order to determine disability or care-dependency for the purposes of recommending a finding for the awarding of a social grant.”⁸⁸³

The medical assessments that are done will often have to be conducted by health care personnel in an overburdened public health care sector.⁸⁸⁴ There is little to no

⁸⁸⁰ Section 13 of the SAA provides for social relief of distress on prescribed grounds. Regulation 9 expands on this general provision and requires that an applicant be “in need of immediate temporary assistance.” Such applicant must also show that he or she:

- “(a) has insufficient means; and
- (b) is a South African citizen or a permanent resident or a refugee and complies with any of the following conditions -
 - (i) the person is awaiting payment of an approved social grant;
 - (ii) the person has, for a period of less than six months, been assessed to be medically unfit to undertake any remunerative work;
 - (iii) no maintenance is received from a parent, child or a spouse obliged in law to pay maintenance and proof is furnished that efforts made to trace such a person or obtain maintenance were unsuccessful;
 - (iv) the breadwinner of that person's family has died and the application is made within three months of the death of such breadwinner;
 - (v) the breadwinner of that person's family has been admitted to an institution funded by the State; or
 - (vi) the person has been affected by a disaster as defined in the Fund-raising Act, 1978 (Act No. 107 of 1978) or the Disaster Management Act, 2002 (Act No. 57 of 2002); and
 - (vii) refusal of the application for social relief of distress may cause undue hardship as contained in the Procedure Manual for Social Relief of Distress approved by the Minister.”

⁸⁸¹ Section 9(b) of the SAA. This is in addition to an age requirement.

⁸⁸² Regulation 3(b).

⁸⁸³ Regulation 1.

⁸⁸⁴ JM Tumbo. “Factors that Influence Doctors in the Assessment of Applicants for Disability Grant.” (2008) 50(2) *South African Family Practice* 65 at 65a writes the following about disability assessments:

“Doctors in state hospitals and clinics are tasked with the duty of assessing applicants for this grant. Ideally, the assessment is done by an institutional committee consisting of a doctor, physiotherapist, social worker, occupational therapist and specialised nurses. This is not always the case, however, because of a shortage of personnel, particularly in rural areas. In my setting, the assessment committee usually consists of the doctor, a social worker and the physiotherapist. On some occasions only the doctor is available for the assessment of applicants for a disability grant.”

consideration of social barriers that prevent people with impairments from working. Projects that sought to have assessments done by panels that would consider environmental and social factors that impact on people's ability to work were undertaken, but there has now been a return to what are considered to be "objective" medical criteria.⁸⁸⁵ However, these criteria may ignore the social and environmental barriers that make it difficult for persons with impairments to access work or prevent them from gaining such access altogether.⁸⁸⁶ As Kelly points out, "the confusion between medical diagnosis and actual functional capacity" has also often led to disability grants being awarded to people who may have been able to work.⁸⁸⁷

Medicalised assessments are relatively easier to conduct, are arguably easier to oversee and to apply consistently and require fewer human and other resources.⁸⁸⁸ However, the trade-off is that people who may be able to work with appropriate support or other accommodations are declared unfit to work. Similarly, people with atypical physical, intellectual or psychosocial characteristics may be prevented from working by social and environmental barriers, but narrow medical assessments may find that they are fit to work.

More empirical work needs to be done on the effects of the assessment system – who it includes and excludes, the likely consequences if it were to be amended and the resources that would be necessary to administer an amended assessment regime.⁸⁸⁹ In addition, the links between the content and enforcement of disability

⁸⁸⁵ G Kelly. "Regulating Access to the Disability Grant in South Africa, 1990-2013." (2013) <https://open.uct.ac.za/bitstream/handle/11427/8576/WP%20330.pdf?sequence=1> (Accessed: 16 May 2015) 38.

⁸⁸⁶ See 2.3.1.1.

⁸⁸⁷ Kelly 24-25.

⁸⁸⁸ For a discussion of the factors – most of which are subjective – that influence doctors when assessing disability, see Turnbo 65a-65b.

⁸⁸⁹ See L Swartz and M Schneider. Tough Choices: Disability and Social Security in South Africa. In: B Watermeyer, L Swartz, T Lorenzo, M Schneider and M Priestley (eds). *Disability and Social Change: A South African Agenda*. (2006) 234-244 for a useful discussion of the different balancing of interests that needs to take place in assessments. These authors cite (at 241) a passage by Jette that encapsulates the challenges inherent in disability assessment:

"This assessment has to be sensitive and specific, so it can deal with false positives as well as with false negatives [...] In addition, it has to be practical, safe, and ideally, inexpensive to administer. That is no easy task. In fact, anyone who has done work on assessment knows that attaining this goal is like searching for the 'holy grail'. It cannot be done; it is extremely challenging to try to meet all of these criteria. A major challenge [...] in trying to measure disability is to balance the scientific concerns (like reliability and validity) with the practical and pragmatic concerns requiring real-world trade-offs. One has to give up some reliability and

equality laws that require the inclusion of disabled workers on the one hand, and applications for social assistance on the other, have to be explored further.

6.3.4.2 Occupational injuries and diseases and Return-To-Work (RTW) measures

The COIDA is the general workers' compensation scheme for those who suffer occupational injuries⁸⁹⁰ or contract occupational diseases.⁸⁹¹ The system compensates in cases of temporary disability, permanent disability and death. Provision is also made for the payment of medical expenses and for the payment of additional compensation in situations where employers or their representatives were negligent. Compensation is calculated based on the earnings of the employee prior to disablement or death, as well as on the degree of disablement. The latter is not calculated according to functional capacity, but rather according to values attached to different body parts or, in the case of psychiatric conditions, unknown criteria.⁸⁹² This reflects a biomedical conception of impairment and disability.

A further indication of the relatively little attention that has been paid to structural barriers that face persons whose impairments can be ascribed to work-related causes, is the fact that RTW measures have not been incorporated into COIDA or the Occupational Diseases in Mines and Works Act (ODMWA).⁸⁹³ The result is that such workers are often left with little compensation and are not provided with

validity, sensitivity and specificity if, in fact, the goal also is to come up with something really practical and inexpensive to administer. It is not possible to achieve all of these."

See, also J Andrews, M Fourie and R Watson. Issues in Disability Assessment. In: B Watermeyer, L Swartz, T Lorenzo, M Schneider and M Priestley (eds). *Disability and Social Change: A South African Agenda*. (2006) 245-259. They note (at 256) that the method of assessment will differ, depending on the purpose for which the assessment is done, that the applicant for benefits must be placed at the centre of the assessment and that various options for him or her must be considered. He or she must be given an opportunity to relate his or her experiences. Their exposition of what needs to be assessed for different types of productivity (at 257) is particularly useful. See, also, R Gorven. "The Implications of a Social Understanding of Disability for Assessment in the Disability Grants Application Process." (2014) *Responsa Meridiana* 32.

⁸⁹⁰ Section 22 of COIDA.

⁸⁹¹ Section 65 of COIDA.

⁸⁹² See M du Plessis. *Compensating Employees who Suffer Work-related Psychiatric Harm in the Course and Scope of their Employment*. (2007) 21-23.

⁸⁹³ Act 78 of 1973.

opportunities to be (re)integrated into the labour market.⁸⁹⁴ They are likely to become dependent on social assistance grants, even if they are willing and able to work.⁸⁹⁵

Olivier, in a comprehensive 2011 report to the Compensation Fund, proposed that a chapter be inserted into COIDA to provide for RTW mechanisms.⁸⁹⁶ In his view, this chapter could incorporate the following changes:

“Describe and define the roles, functions and responsibilities of various role-players, in a manner which creates legal obligations;

- Identify the range of incentives (positive and negative) to promote participation in RTW interventions;
- Adjust, in COIDA, the notions of ‘benefits’, ‘medical aid’ and ‘rehabilitation activities’ to ensure that the complete range of RTW-linked rehabilitation activities is covered;
- Extend the range of benefits/ services available in the event of occupational diseases to specifically include rehabilitation and reintegration within the framework of RTW;
- Introduce a legal obligation to keep the position of an occupationally injured/ diseased employee open for a particular period of time, subject to participation in an agreed rehabilitation plan;
- Extend dismissal protection, also within the context of the Labour Relations Act 66 of 1995, to specifically protect occupationally injured/ diseased employees from being dismissed or otherwise disadvantaged while they are engaged in an agreed rehabilitation activity. This protection could be time-bound;

⁸⁹⁴ The fact that compensation is earnings-related works to the detriment of low-income workers, who are often more at risk of suffering harm due to occupational injuries or diseases. R U'Ren and M U'Ren. “Workers’ Compensation, Mental Health Claims, and Political Economy.” (1999) 22(5-6) *International Journal of Law and Psychiatry* 451 at 460 note: “In terms of health, individuals in lower social status groups have the highest rates of morbidity and mortality for almost every medical and psychiatric disorder.”

⁸⁹⁵ M Olivier, A Govindjee, E Cheong and M Azman bin Aziz Mohammed. “Return-To-Work and Disability Management in the Developing World: Developments in South Africa and Malaysia, with Reference to the UN Convention on the Rights of Persons with Disabilities and Comparative Precedents.” (2012) <http://ilera2012.wharton.upenn.edu/RefereedPapers/CheongEdmund.pdf> (Accessed: 16 May 2015).

⁸⁹⁶ M Olivier, A Govindjee, A Wolvaardt and M Nyenti. “Rehabilitation, Reintegration and Return-To-Work of Workers who have Suffered Occupational Injuries or Diseases.” (2011) [http://eiifa.org/download/publ/Compensation%20Fund%20\(RTW%20project\)\(FINAL%20POLICY%20DOCUMENT\)\(April%202011\).pdf](http://eiifa.org/download/publ/Compensation%20Fund%20(RTW%20project)(FINAL%20POLICY%20DOCUMENT)(April%202011).pdf) (Accessed: 16 May 2015) 11-12.

- Consider the adoption of similar interventions and forms of protection in ODMWA (Occupational Diseases in Mines and Works Act) and in environments not covered by COIDA, to ensure consistency of treatment of all workers in South Africa;
- Clarify certain provisions of the Unemployment Insurance Act 63 of 2001 (UIA), including the introduction of a provision which would disqualify a beneficiary in the event of refusal or failure to participate in a RTW-based rehabilitation programme;
- Establish a new multi-level or multi-tiered dispute resolution framework, impacting on RTW and rehabilitation within the COIDA framework; and
- Reformulate COIDA provisions regarding the position of migrant workers and (South African) workers abroad.”

An in-depth analysis of these proposals falls beyond the scope of this work. However, in principle, RTW measures could promote access to work for disabled persons and be consistent with social understandings of disability that emphasise autonomy and substantive equality. The implementation of RTW measures warrants considerable attention, especially the extent to which it takes cognisance of social and environmental barriers that prevent disabled persons from functioning. This element assumes particular importance if punitive measures are used against those who refuse or fail to participate satisfactorily in RTW programmes.

6.3.4.3 Unemployment insurance regulatory framework

Unemployment insurance in South Africa is regulated by the UIA and the Unemployment Insurance Contributions Act.⁸⁹⁷ The scheme can be characterised as passive in that it only provides short-term income protection through the payment of benefits to contributors who satisfy prescribed criteria.⁸⁹⁸ The five types of benefits are for unemployment, illness, maternity, adoption and dependants.

⁸⁹⁷ Act 4 of 2002.

⁸⁹⁸ A Govindjee, M Olivier and O Dupper. “Activation in the Context of the Unemployment Insurance System in South Africa.” (2011) 22(1) *Stellenbosch Law Review* 205 at 209.

The long-term unemployed are not covered, nor are those in atypical employment and those who work in the informal economy.⁸⁹⁹ These cohorts are likely to include many disabled persons. Those who resign or suspend their own employment are also excluded. The reason for the exclusion is to prevent abuse of the system, but it also has the consequence that people who leave employment to study further or to undergo skills training and those who want to start their own businesses are affected adversely. Dupper, Olivier and Govindjee therefore propose that unemployment benefits be extended to those who leave their employment to pursue further education or training, to become self-employed or for any compelling reason relating to their families.⁹⁰⁰

This proposal may benefit people who, for disability-related reasons, want more flexibility or need to change their occupations and therefore choose to study or become self-employed. It would also offer some protection to people who pursue these options due to unwelcoming or unsupportive work environments, particularly if the enforcement of positive non-discrimination duties and affirmative action duties is weak.

Apart from issues of coverage, the unemployment insurance framework also does not link unemployment insurance to active labour market policies that seek “to influence the employment prospects of the unemployed by encouraging or mandating participation in job-search assistance programmes and skills training, or by directly increasing the returns to labour (for example through wage subsidies).”⁹⁰¹ Disabled persons’ access to work could be improved through such measures.

While active labour market policies as part of unemployment protection would, in principle, be a positive development, mandatory participation in RTW programmes, the denial of benefits to those who refuse, without just cause, to undergo training and vocational counselling with a view to obtaining employment under any scheme raises concerns about unjustifiable compulsion and denial.⁹⁰² In response to these

⁸⁹⁹ O Dupper, M Olivier and A Govindjee. “Extending Coverage of the Unemployment Insurance-system in South Africa.” (2010) 21(3) *Stellenbosch Law Review* 438 at 449.

⁹⁰⁰ Dupper, Olivier and Govindjee 447.

⁹⁰¹ Govindjee, Olivier and Dupper 205.

⁹⁰² Section 16(2) of the UIA. See Govindjee, Olivier and Dupper 212-214.

concerns, Olivier, Dupper and Govindjee argue that the UIA ought to be amended to clearly indicate that an unemployed contributor is not compelled to take up a non-suitable position.⁹⁰³

In my view, the non-suitability inquiry is of particular importance for disabled people. It has to take into account environmental and social barriers that include the characteristics of particular jobs, as well as wider structural impediments. Issues such as the provision of effective reasonable accommodation measures, if necessary; the availability of suitable transport to and from work; and the organisation of work and how it would affect persons with particular impairments or conditions will have to be considered carefully and pro-actively. In this regard, comprehensive, integrated measures such as the provision of accessible transport and health care systems, accessible buildings, employment support and vocational guidance have to be implemented.

6.3.4.4 Disability benefits in the 'private' sphere

Disability benefits are provided for by 'private' pension funds, as well as insurance companies. Definitions of disability are contained in individual pension funds' rules⁹⁰⁴ or in the terms and conditions of policies that provide disability cover.⁹⁰⁵ However, disability assessments would generally consider applicants' personal profiles, their job descriptions and work experience, the aforementioned disability definitions and the fund rules, as well as applicants' medical conditions and how such conditions affect their functioning.⁹⁰⁶

The debates around the causes and assessment of functional limitations discussed above would be equally applicable in this context.⁹⁰⁷ Furthermore, the respective roles of employers and health care professionals warrant attention. Employers, at

⁹⁰³ Olivier, Dupper and Govindjee 406.

⁹⁰⁴ Section 13 of the PFA provides that these fund rules are binding on "the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

⁹⁰⁵ Andrews, Fourie and Watson 248.

⁹⁰⁶ Ibid.

⁹⁰⁷ See 2.3.1.1.

the very least, have an obligation to act in good faith in the interests of members of occupational funds and beneficiaries⁹⁰⁸ and are expected to inform pension funds or insurers timeously if employees have been incapacitated. Employers must also not usurp the discretion of insurers to decide entitlements to disability benefits.⁹⁰⁹ Employers' failures to comply with these obligations are detrimental to affected employees, who may receive less generous withdrawal benefits or no benefits at all.⁹¹⁰ The Pension Funds Adjudicator⁹¹¹ has awarded damages in favour of complainants against employers where such complainants did not access disability benefits because the employers had failed to inform the relevant pension funds or insurers of the complainants' disabilities.⁹¹²

Health care professionals also have to act in the interests of patients. In some instances, for example, employees may be found to be incapacitated, but that is not a guarantee that they would gain access to permanent disability benefits. Writing in the context of medical boarding on psychiatric grounds, Mokoka, Rataemane and dos Santos note:

"Patients should be informed that being medically boarded on psychiatric grounds is likely to make it extremely difficult to obtain alternative permanent employment, and even further insurance. Also, being medically boarded does not guarantee that the patient's medical disability policies will be paid out. The patient should be advised to obtain full details from the insurance company or broker beforehand about the conditions and requirements of these policies. The long-term financial implications should be discussed with a financial advisor. It would be prudent for psychiatrists to warn their patients that they may find themselves unemployed and without an adequate income, even when there are sufficient grounds for medical boarding."⁹¹³

⁹⁰⁸ *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) 235B-D.

⁹⁰⁹ N Jeram. "Participating Employers under Scrutiny in Disability Claims." (2008) 29 *Industrial Law Journal* 51 at 57.

⁹¹⁰ See the discussion of the *Namane*, *Fortuin* and *Swanepoel* cases in Jeram 51-56.

⁹¹¹ Established in terms of s 30B of the Pension Funds Act.

⁹¹² See, for example, *Swanepoel v Samancor Ferrometals Ltd and Samancor Group Pension Fund*, Unreported Case no. PFA/GA/644/2002/RM, 15 February 2005.

⁹¹³ MT Mokoka, ST Rataemane and M dos Santos. "Disability Claims on Psychiatric Grounds in the South African Context: A Review." (2012) 18(2) *South African Journal of Psychiatry* 34 at 40.

This passage also raises the issue of disabled persons falling through the cracks of uncoordinated incapacity determination systems and eligibility requirements for private disability benefits. Government needs to exercise its regulatory functions to ensure better coordination or, at the very least, to provide measures that will ameliorate the consequences of incapacitated persons not receiving or receiving inadequate disability benefits from ‘private’ pension funds or insurance policies.

6.3.4.5 Employment services

Another aspect in which it would be important to highlight the intersection of substantive equality and access to work is in the provision of employment services to disabled people. The Employment Services Act⁹¹⁴ (the ESA) has laudable objectives that include the promotion of employment, the improvement of access to the labour market for work seekers, the promotion of the employment prospects of work seekers, and vulnerable work seekers in particular, and the facilitation of access to education and training to the same category of persons.⁹¹⁵

These objectives are to be achieved through the provision of “comprehensive and integrated free public employment services”, the coordination of public service activities that impact on the provision of employment services, the encouragement of partnerships to promote employment, the establishment of “schemes and other measures to promote employment” and the provision of a “regulatory framework for the provision of private employment services.”⁹¹⁶

In terms of the ESA, the Minister of Labour may, after consulting the Employment Services Board, establish work schemes that aim to enable “youth and other vulnerable work seekers to enter employment, remain in employment or be placed in opportunities for self-employment.”⁹¹⁷ These schemes must provide work that complies with the employment standards set in the Basic Conditions of Employment

⁹¹⁴ Act 4 of 2014. The Act was assented to on 7 April 2014 and at the time of writing its commencement date had yet to be proclaimed.

⁹¹⁵ Section 2(1).

⁹¹⁶ Section 2(2).

⁹¹⁷ Section 6(1).

Act (BCEA) or collective agreements.⁹¹⁸ The Minister of Labour may also issue regulations that require employers to notify the Department of Labour of any vacancies in their organisations, if any work seeker referred by a labour centre has been employed and any information that may be relevant to the provision of effective job matching services.⁹¹⁹

Chapter 6 of the ESA is entitled “Promotion of Supported Work for Persons with Disabilities”. It provides for the establishment of “Supported Employment Enterprises” (SEE) as a national government component⁹²⁰ consisting of a Head of SEE and any staff members he or she appoints.⁹²¹ The Act gives no indication of how many staff members would be appointed, but provides that the Minister of Labour may decide on post structures after consulting the Minister of Finance.⁹²² The SEE is to be financed from “money appropriated by Parliament for this purpose”; “income earned from services rendered by it”; “grants or donations made to it”; and “money received from any other source.”⁹²³

The SEE’s functions are listed as being to:

- “(a) facilitate supported employment;
- (b) provide work opportunities for persons with disabilities;
- (c) develop and implement programmes that promote the employability of persons with disabilities, including persons with permanent disablement as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 Act No. 130 of 1993), in the light of their evolving needs in a changing economy; and
- (d) perform any other function as may be prescribed by the Minister.”⁹²⁴

There are several notable aspects to the scheme of the ESA, as briefly set out above. The first is that persons with disabilities are not specifically listed as

⁹¹⁸ Section 6(2).

⁹¹⁹ Section 10.

⁹²⁰ Section 42.

⁹²¹ Section 45(c).

⁹²² Section 46.

⁹²³ Section 47.

⁹²⁴ Section 43.

vulnerable work seekers (youth is the only specified category), but it is hoped that they are recognised as such. In light of the definition of persons with disabilities used in the Act,⁹²⁵ it would be difficult to argue that such persons are not vulnerable work seekers.

Secondly, the provisions on supported employment imply that all persons with disabilities qualify for or are in need of supported employment. The interpretation clause in the ESA states that its provisions must be interpreted in line with the Constitution and relevant international labour standards and treaties. It is therefore submitted that on the basis of substantive equality, the relevant provisions must be read to mean that supported employment must be promoted for people with disabilities who cannot work in the open labour market. As Liebenberg points out, any services that are “delivered in ways which reinforce stereotypes and undermine the dignity of the recipients” would infringe the right to equality.⁹²⁶ Furthermore, the work and employment provisions in the CRPD emphasise that states parties must facilitate “the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.”⁹²⁷

The third notable aspect of the scheme is the unreliable funding structure for the SEE. It may be that it is funded extensively, but nothing in the legislation guarantees adequate funding. Disabled People’s Organisations and other interested parties will therefore have to monitor the operations of the SEE closely in order to ensure accountability and the effective provision of supported employment to those who want and need it.

⁹²⁵ It provides (in Section 1): “**persons with disabilities**’ includes persons who have long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others [emphasis in the original].”

⁹²⁶ S Liebenberg. Equality Rights and Children: Moving Beyond a One-Size-Fits-All Approach. In: Hall, K; Woolard, I; Lake, L and Smith, C (eds). *South African Child Gauge*. (2012) 24 at 28.

⁹²⁷ Article 27(1).

6.4 Concluding remarks

Positive obligations imposed on government may assist in the achievement of structural changes that have a wider ambit and that can promote the achievement of substantive equality. Particular focus was placed on the role that can be played by the socio-economic right to access to social security and its implications for access to work or, alternatively, by an independent right to access to work. Significant limitations operate in respect of the rights in s 27 – they are progressively realisable and their content is limited by the lack of resources. However, these rights place an obligation on government to account for its policies and the implementation of policies and programmes in the social sphere.

This obligation to account may conceivably be used to improve information gathering on disabled work seekers; frame positive non-discrimination duties and affirmative action duties as components of unemployment protection; promote recognition of the interrelated, mutually supportive nature of the components of social security and monitor the inception and implementation of employment services for disabled persons.

At various points, I have highlighted the intersection of substantive equality and the socio-economic right relating to access to work. In particular, I have emphasised the development of the value of freedom in relation to disabled work seekers, as discussed in Chapter 3.⁹²⁸

⁹²⁸ See 3.4.1.1.

CHAPTER 7: OVERALL CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

The primary research question that this work set out to answer relates to the potential synergies and points of frictions between social understandings of disability and conceptions of equality and social security in the context of promoting access to work for persons with disability in South Africa. The approach followed in order to answer this question focused on five components. Firstly, the nature and content of the debates on conceptions and, by extension, causes of disability within a field loosely described as disability studies were examined. The second component contained an examination of the approaches to substantive equality, the goals such approaches envision and how these would apply in relation to disabled persons' access to work. Component three highlighted the duties of restraint that operate in the non-discrimination framework and also focused attention on the conception of disability used to determine who should qualify for protection from unfair discrimination.

After the first three components, which were theoretical in orientation, the rest of the work contained analyses of constitutional and legislative provisions, and how these laws have been interpreted, applied and enforced, with particular emphasis on positive obligations on employers and government. Component four considered these positive obligations in the realm of employment equity, which comprised both non-discrimination duties and affirmative action duties. In light of the limitations identified in respect of the employment equity duties, the fifth and final component then examined how positive obligations can be widened in terms of their scope and spheres of application in order to assist potential work seekers who are disabled at earlier junctures than when they are already in position to apply for work and in order to improve government's accountability in respect of its enforcement of employers' positive non-discrimination duties and affirmative action duties.

In what follows, I highlight the most prescient insights that flowed from the above analyses and the conclusions reached. I also suggest possible lines of inquiry that can be pursued in light of these insights and which could not be pursued here.

7.2 Social understandings of disability

The simple, yet profound, premise that undergirds social understandings of disability is that disability is not an attribute of the individual, but a socially contingent phenomenon located at the intersection of an individual's attributes and his or her physical and social environment. As a result, the meaning of disability shifts over time and place.

The most important implication of this premise is that societies can shape their social structures, work processes, physical environments and cultural traditions and practices to minimise activity limitations experienced by individuals who have physical, intellectual or psychosocial characteristics that deviate from general norms. These changes can occur through reshaping norms, through the elimination of barriers disabled persons face in attaining these norms or through a combination of these.

What is recognised as work and the organisation of work have been central to disabling people. In contemporary societies, global capital mobility and technological change offer opportunities as well as pose challenges for disabled persons' access to work. While regulation by national states is not the powerful tool it once was, it can be used to contribute to changes that would promote such inclusion.

When we consider what these processes of inclusion should achieve, insights from the debates within disability studies suggest that there must be recognition of the interaction between impaired or atypical bodies and their environments; that attention must be paid to addressing both the material and the socio-cultural disadvantages experienced by disabled persons; and that analyses of the barriers to

inclusion and how these can be overcome must consider both objective facts and the affected disabled persons' experiences of their conditions and circumstances.

7.3 Substantive equality

The notion of substantive equality is consistent with the idea that society must treat disadvantaged groups more favourably in certain circumstances in order to ensure equality. If structural barriers that impede disabled persons' access to work are to be removed, positive action will be imperative. However, in traditional non-discrimination law, it is difficult to impose extensive positive obligations on employers when they are not the cause of whatever disadvantages exist. This tendency to individualise also influences the identification of who is protected from unfair discrimination, and decisions on the causes of discrimination may exclude consideration of many structural factors that contribute to disabled persons' disadvantage. Concerted efforts therefore have to be made to contextualise disability, to emphasise its social contingency at all points in organisational and legal processes and to highlight the social dimensions of rights.

Another important aspect that warrants attention is the determination and communication of the principles that underpin the imposition of positive obligations on employers and government in ensuring access to work. In this regard, dignity as a guiding value of the right to equality is useful, but its social dimensions have to be developed. Furthermore, the value of freedom, particularly as used in the capabilities approach developed by scholars such as Sen and Nussbaum, has to animate the conception and implementation of laws that aim to facilitate access to work. Such an approach would recognise the importance of support to disabled persons without reducing them to passive recipients of benefits who have little to no autonomy in how they earn a living. A focus on the development of capabilities would also highlight that it is not just the provision of work opportunities that is needed, but also various forms of support that can expand disabled persons' capacities to utilise whatever opportunities exist.

7.4 Unfair discrimination and affirmative action

The prohibition of unfair discrimination is important to curb ongoing disadvantage that can be linked to particular statuses. However, duties of restraint have limited use in contexts where structural factors inhibit access to social processes and benefits.

The Constitution, the EEA and the PEPUDA all contain relatively progressive positive obligations. The duty to reasonably accommodate disabled work seekers, which is a positive non-discrimination duty as well as an affirmative action duty, is useful in situations of indirect discrimination where it is necessary to balance the interests of employers and work seekers.

However, it is particularly difficult to enforce this duty in relation to work seekers, because employers are able to hide their reasons for not appointing a person who requests accommodation; the remedies that are available are reactive and aggrieved unemployed persons often do not have adequate support to pursue such remedies; the power differentials in the negotiation process are skewed and employers are likely to be less inclined to provide accommodations to work applicants as opposed to existing employees; and current enforcement processes provide little to no information on the extent and the modes of operation of barriers to the fulfillment of reasonable accommodation.

The positive non-discrimination duties in the EEA have the potential to remove barriers that may operate to disadvantage people with specific kinds of disabilities more generally. In this sense, these duties can be used more proactively than reasonable accommodation duties. Similar duties that are even more specific operate in the context of affirmative action. However, the duty bearers are limited to designated employers. If these duties are enforced, there is a possibility that they may contribute indirectly, through networks, to the removal of barriers in organisations that are not designated employers.

Although positive obligations on employers are an important tool, the enforcement of these duties could be improved, both in inception and implementation. In particular,

more could be done to clarify the goals that underpin the imposition of the duties in respect of disabled persons, as the guidelines to employers still tend to individualise disability. There could also be more dynamic negotiation of the interrelationship between regulatory goals and employer aspirations. The quality of the consultations between employers and employees can be enhanced. Overall, more resources are required to monitor compliance effectively and impose sanction where appropriate.

Finally, an important limitation of positive employment equity duties is that they are imposed on individual employers and their content is largely dependent on the resources available to particular employers. Their scope and ability to effect structural change are therefore limited. Ways have to be conceived of imposing duties on social actors with a wider reach and who have relatively more regulatory power. This is where positive obligations on government are relevant.

7.5 The state's positive obligations in respect of access to work

The state is already making and implementing policy that accords it an active role in employment creation. At present, it is unclear whether the rights in the Constitution can be interpreted to hold government accountable for its performance of these functions beyond reviews for rationality or in respect of administrative action. I argue that a generous, purposive interpretation of the ambit of the right to social security can be utilised for this purpose.

Imposing positive obligations on the state in respect of access to work would create opportunities to strengthen claims for the state to improve the enforcement of employment equity measures, which are in essence unemployment protection devices. It can also be used to compel information gathering in respect of the barriers disabled work seekers face and their socio-economic circumstances. Furthermore, if we regard unemployment protection as one component of social security, invoking principles of substantive equality would allow the questioning of paternalistic forms of social support that emphasise cash transfers at the expense of the facilitation of access to work for those who are willing and able to work.

7.6 Final concluding remarks

If we revert to the original research question, it is clear that there are important synergies between social understandings of disability and mainstream approaches to substantive equality. Both foresee the imposition of positive action to address the disadvantage caused by past and continuing discrimination. However, the law operates within limitations that inhibit its potential to effect deep, revolutionary change. At best, it can be one tool in what are essentially social, political and economic processes. At worst, it can mask failures to effect change and insulate these failures by protecting the status quo.

The conception and implementation of employment equity laws and social security laws reveal that social understandings of disability have not permeated micro-processes sufficiently to ensure the kind of transformation disability movements would like to see and experience. Disabled work seekers are at a particular disadvantage because they are not likely to be viewed in the same light as existing employees and they face legal and structural impediments if they are in a position to challenge unfair discrimination.

The varied resources required for this transformation are limited and it is obvious that government faces a difficult task in balancing diverse and urgent demands. At the very least, we can seek to hold government accountable for its use of all the available resources and to require that all relevant role players work progressively to ensure access to work for those disabled persons who can and want to work in an accessible, open labour market. For those disabled persons who cannot work in the open labour market, supported employment and other means of productive work can be fashioned in ways that recognise the inherent worth of these individuals and their status as members of our communities.

7.7 Recommendations for future research

The broad analyses conducted in this work have left open various questions that can form the basis for future research. Some of these potential research projects could attempt to address all, or part, of the following questions:

- (i) If social theories of impairment are developed within disability studies or within the social sciences more generally, what are the implications of such theories, if any, for equality laws and how these are implemented?
- (ii) How can the value of freedom, as it applies to persons with disabilities, be utilised in other contexts in which disabled persons' autonomy is infringed?
- (iii) In which ways can the enforcement regime for employment equity be improved to work more effectively to promote access to and retention of work for disabled persons?
- (iv) If proactive approaches to the enforcement of equality for disabled persons are to be pursued, how would such laws be designed and what are the preconditions for effective implementation?
- (v) How can a broader conception of social security be used to inform submissions in policy processes that seek to offer social protection not only to disabled persons, but also other vulnerable groups?
- (vi) Do the law of evidence and evidentiary processes strike an appropriate balance between consideration of 'objective' facts and the articulation of disabled persons' experiences in particular areas of law, for example criminal law, labour law or personal injury law?
- (vii) What contextual factors operate to the advantage and to the detriment of people with particular conditions or impairments in specific environments?

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